TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 283.

J. D. HEGLER, PLAINTIFF IN ERROR,

vs.

GEORGE D. FAULKNER ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 10, 1885.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from State court	1	1
Petition	1	1
Order granting leave to answer	2	1
Answer	3	2
Stipulation as to amount in controversy	4	3
Minutes of trial	5	3
Verdict	6	4
Judgment	6	4
Motion for new trial	7	5
Stipulation as to bill of exceptions, &c.	9	6
Order overruling motion for new trial	10	7
Bill of exceptions	11	7
Testimony of Chauncey Norris	14	10
E. S. Towle	14	10
J. H. Broady	17	12
E. W. Thomas	21	14
Exhibit A—Instructions of Office of Indian Affairs to Joseph L. Sharp, May 14, 1856	26	18
B—Abstract certificate of allotment to Geo. Washington, April 15, 1859	27	19
C—Patent to Geo. Washington, September 10, 1860	28	19
E—Deed of Washington to Nuckolls, April 16, 1859	28	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 2, 1887.

	Original.	Print.
Exhibit F—Deposition of Wm. M. Stark	28	20
Exhibit A—Deed of Nuckolls *et ux.* to Ballard, April 20, 1859	31	22
B—Deed of Ballard to McMillen, September 16, 1859	32	22
C—List of half-breeds entitled to allotments	33	23
Exhibit G—Deed of McMillan *et ux.* to Hegler, October 13, 1859	33	23
Q—Deposition of J. D. Hegler	34	23
R— " Wm. M. Stark	35	24
S—List of half-breeds entitled to allotments, &c.	36	25
T—Deposition of J. D. Hegler	38	26
U— " L. A. Ryan	38	26
U²— " Chas. F. Walther	39	27
X—Tax receipts	40	28
Y—Deposition of Wm. R. Cain	40	28
H—Patent to Geo. Washington	41	29
T—Deed of Washington to Schoenheit *et al.* November 3, 1866	41	29
K—Deed of Washington *et ux.* to Shoenheit *et al.*, February 28, 1868	41	29
L—Deposition of Elisha Deroim	42	29
M— " Lag-gar-ash	43	30
N—Deed of Hegler to Wilkinson, February 6, 1860	44	31
O—Deposition of Daniel Vanderslice	45	32
O²— " Sam'l M. Irwin	45	32
P— " Daniel Vanderslice	46	32
W—Abstract of answer in Hegler *vs.* Faulkner *et al.*	47	33
Z—Laws of Nebraska in force April, 1859: p. 165, act of 1856	49	34
Plaintiff's requests	49	34
Charge	50	35
Certificate to bill of exceptions	64	43
Writ of error	65	44
Citation and service	66	44
Clerk's certificate	67	45

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of May, A. D. 1885.

Be it remembered that on the 25th day of March, 1879, a transcript was filed in the office of the clerk of said circuit court, in which transcript is contained a petition which is in the words and figures following, to wit:

October 4th, 1878, came J. D. Hegler, by his attorney, J. H. Broady, Esq., and filed the following petition, to wit:

Petition.

In the District Court of Richardson County, Nebraska.

J. D. HEGLER, Plaintiff,

vs.

GEORGE FAULKNER, JAMES COTTIER, AUGUST SCHOENHEIT, and EDWIN S. TOWLE, Defendants.

The plaintiff says he has a legal estate in and is entitled to the possession of the following-described premises, situated in said county of Richardson, to wit: The north half of section eight (8), in township two (2) north, of range seventeen (17) east, containing 320 acres, more or less.

The defendants have for a long time past unlawfully kept the plaintiff out of the possession of said premises.

The plaintiff, for his second cause of action, alleges that the defendants, whilst they unlawfully kept the plaintiff out of the possession of said premises, as above stated, have received the rents and profits of said premises of the value of twenty-five hundred dollars and refuse to account for or pay the plaintiff any part of said rents or profits.

2 The plaintiff asks judgment for the delivery of the possession of said premises to him, and also for the sum of twenty-five hundred dollars, on account of said rents and profits and costs of suit.

J. H. BROADY,
Att'y for Plaintiff.

STATE OF NEBRASKA, } *ss:*
County of Nemaha, }

I, J. H. Broady, being first duly sworn, say I am attorney for the said plaintiff, who is a non-resident of and absent from said State; that the facts stated and allegations made in the foregoing petition are true, as I believe.

J. H. BROADY.

Subscribed in my presence and sworn to before me this 1st day of Oct., 1878.

WILLIAM H. HOOVER,
Clerk District Court, Nemaha Co., Nebraska.

Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 107 E. J. D. Hegler *vs.* Geo. Faulkner *et al.* Transcript. Filed Mar. 25, 1879. Watson B. Smith, clerk.

Thereupon, afterwards, at the May term of said court, on the 6th day of May, 1879, the following proceedings were had and done in said case, as appears of record on folio 384, Journal "E," of said court, to wit:

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } 107 E.

On motion of said defendants, by Messrs. Schoenheit, Thomas & Towle, their attorneys, leave is hereby granted them to answer in 30 days, and plaintiff is ruled to reply in 50 days, and cause continued.

Thereupon, afterwards, to wit, on the 17th day of May, 1879, an answer was filed in said case, which said answer is in words and figures following, to wit:

3 *Answer of Def'ts.*

In the Circuit Court of the U. S., Dist. of Nebraska.

J. D. HEGLER

vs.

GEO. FAULKNER, AUG. SCHOENHEIT, JAMES COTTIER, & EDWIN S. TOWLE.

And now come the said def'ts above named and for answer to the petition of pl'ff filed herein say:

That it is not true and they therefore deny that the said plaintiff is the owner of or has a legal estate or title to the land in controversy.

Defendants, further answering, deny that they or any of them unlawfully keep the said pl'ff out of the possession of said demanded premises.

Defendants further say that they are the owners in fee simple of said land and that said plaintiff has not now nor ever had any legal estate therein, but that the legal estate of the — is vested in them.

Wherefore def'ts ask that they may be hence dismissed with their costs herein incurred.

SCHOENHEIT & TOWLE,
Att'ys for Def'ts.

UNITED STATES OF AMERICA, } ss:
State of Nebraska, }

Edwin S. Towle, being first duly sworn, says that he is one of the def'ts in the above-entitled cause, and that the matters, facts, & allegations contained in the foregoing answer are true as he believes.

EDWIN S. TOWLE.

Subscribed in my presence and sworn to before me this 7th day of May, 1879.

WATSON B. SMITH,
Clerk U. S. Court,
By E. D. FRANK, *Deputy.*

4 Upon the back of said answer appear endorsements in words and figures following, to wit: No. 107 E. J. D. Hegler *vs.* Faulkner *et al.* Answer of def'ts. Filed May 17th, 1879. Watson B. Smith, clerk. Schoenheit & Towle, att'ys for def'ts.

Thereupon, afterwards, to wit, on the 11th day of December, 1882, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUSTUS SCHOENHEIT, and E. S. TOWLE, Defendants.

It is agreed by and between the parties hereto that the amount in controversy in this action exceeds five thousand dollars and that the land involved in this action is worth more than five thousand dollars.

December 8, 1882.

SCHOENHEIT & TOWLE,
Att'ys for Def'ts.
J. H. BROADY, *Att'y for Pl'ff.*

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 107 E. J. D. Hegler *vs.* George Faulkner *et al.* Stipulation. Filed Dec. 11, 1882. Elmer D. Frank, clerk.

Thereupon, afterwards, at the January term of said court, on the 7th day of January, 1885, the following proceedings were had and done in said case, as appears of record on folio 733, Journal "I," of said court, to wit:

5 J. D. HEGLER
vs.
GEO. FAULKNER *et al.* } 107 E.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit, 1, G. B. Hamilton; 2, Wm. Dennis; 3, Geo. C. Ames; 4, Geo. Ralsten; 5, Roderick McGrath; 6, Chas. P. Burkett; 7, Henry Shaw; 8, Thomas Bryant; 9, R. C.

Manley; 10, A. A. Carman; 11, L. W. Coats; 12, Geo. S. McGrew, who were duly empaneled and sworn according to law, and the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning at ten o'clock.

Thereupon, afterwards, at the said January term of said court, on the 9th day of January, 1885, the following proceedings were had and done in said case, as appears of record on folio 754, Journal "I" of said court, to wit:

Cause Submitted to Jury.

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } No. 107 E.

On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein; and thereupon, after hearing the remaining evidence, the argument of counsel, and charge of the court, said jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

Thereupon, afterwards, at the said January term of said court, on the 10th day of January, 1885, the following proceedings were had and done in said case, as appears of record on folio 757, Journal "I" of said court, to wit:

Verdict & Judgment.

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } No. 107 E.

Now, on this day, again come the parties hereto, by their attorneys—also come the jury empaneled and sworn herein—into open court and present to the court their verdict, which is in words and figures following, to wit:

6 In the United States Circuit Court for the District of Nebraska.

J. D. HEGLER, Plaintiff,
vs.
GEORGE FAULKNER, JAMES COTTIER, AUGUSTUS SCHOENHEIT, and EDWIN S. TOWLE, Defendants.

We, the jury empaneled and sworn in the above-entitled cause, do find all the issues in this cause with the defendants.

GEO. C. AMES, *Foreman.*
THOMAS BRYANT.
W. J. DENNIS.
RODERICK McGRATH.
G. W. RALSTEN.
HENRY SHAW.
GEO. S. McGREW.
A. A. CARMON.
G. B. HAMILTON.
L. W. COATES.
R. C. MANLEY.
CHARLES P. BIRKETT.

It is thereupon considered, ordered, and adjudged by the court that the defendants are the owners of the land involved in this action, to wit, the northeast quarter of section eight, town two (2), range seventeen (17) east, 160 acres, and thirty (30) acres off the east side of the northeast quarter of the northwest quarter of said section, and thirty acres off the east side of the southeast quarter of the northwest quarter of said section, in the aggregate 220 acres, situate in Richardson county, State of Nebraska, and were at the commencement of this suit, and that said defendants were then and still are entitled to possession thereof, and that the plaintiff's claim of title to said land was and is invalid, and said plaintiff was not at the commencement of this action and is not now entitled to the possession of said land.

7 It is further ordered by the court that said defendants have and recover of and from the said plaintiff their costs herein expended, taxed at $—.

Thereupon afterwards, to wit, on the 13th day of January, 1885, a motion for new trial was filed in said case, which said motion for new trial is in words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of the United States.

J. D. HEGLER, Plaintiff,

vs.

GEORGE FAULKNER, AUGUST SCHOENHEIT, JAMES COTTIER, & EDWIN S. TOWLE, Defendants.

Now comes the plaintiff and moves the court here to set aside the verdict of the jury and for a new trial in this action, because—

1st. That the verdict of the jury is not sustained by sufficient evidence and is contrary to law.

2nd. Error of law occurring at the trial and excepted to by the plaintiff.

3rd. Because the court erred in excluding from evidence the answer of the defendants, filed in the district court of Richardson county, Nebraska, Dec. 29, 1881, in the suit by this plaintiff against these defendants concerning the land in controversy, to which plaintiff at the time excepted.

4th. Because the court excluded from the jury as evidence tending to show the age of George Washington, son of Logarash, the official census list furnished by the Department to Mr. Stark, the allotment commissioner, which census list was offered for that purpose by the plaintiff and the same was for such purpose excluded by the court, to which plaintiff at the time excepted.

8 5th. The court erred in excluding from evidence the official and authenticated copy of instructions given by the Department to Mr. Stark for his guidance is discharge of his duties as allotment commissioner, to which plaintiff then excepted.

6th. The court erred in excluding from the jury the answer of the

second interrogatory in the deposition of the witness Stark and in excluding from the jury that part of the answer to the 3rd interrogatory in deposition of said witness Stark, as the same appear at pages 59 to 61 of transcript from the State court, to the exclusion of which evidence plaintiff then excepted.

7th. The court erred in excluding from the jury evidence offered by the plaintiff and excluded, to which plaintiff at the time excepted.

8th. The court erred in admitting in evidence the evidence offered by defendants and objected to by the plaintiff and admitted by the court, to which plaintiff at the time excepted.

9th. The court erred in refusing to give to the jury the fifth (5) instruction requested by the plaintiff and refused by the court, to which the plaintiff then excepted.

10th. The court erred in its oral charge to the jury, reported and transcribed by the stenographer & hereto attached and made a part of this motion, in those certain portions of said charge marked and designated—

1st. As lines 16 to 24 of page 5 of said charge.
2nd. Line 33, page 5, to line 14, page 6.
3rd. Lines 1 to 16, page 7.
4th. Lines 17 to 29, page 7.
5th. Lines 9 to 32, page 8.
6th. Lines 16 to 32, page 9.
9 7th. Line 7, page 10, to line 2, page 11.
8th. Line 3 to line 9, page 11.
9th. Line 27, page 11, to line 8, page 12.
10th. Line 2, page 12, to line 7, page 12.
11th. Lines 9 to 23, page 12.

To which charge plaintiff at time excepted.

J. R. WEBSTER,
Att'y — Pl'ff.

Upon the back of said motion for new trial appear endorsements in words and figures following, to wit: No. 107, E. J. D. Hegler *vs.* George Faulkner *et al.* Motion for new trial. Filed Jan. 13, 1885. Elmer D. Frank, clerk. J. R. Webster, for pl'ff.

Thereupon afterwards, to wit, on the 5th day of June, 1885, stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

Stipulation.

In U. S. Circuit Court, District of Nebraska.

J. D. HEGLER, Pl'ff,
vs.
GEO. FAULKNER, JAMES KARCHER, EDWIN S. TOWLE, and AUGUST SCHOENHEIT, Def'ts.

It is stipulated on behalf of the plaintiff and defendants herein that the plaintiff have thirty days to make and submit to defend-

ants' counsel his bill of exceptions & that the same be, when settled, signed and sealed as of the January term of court.

This cause in Supreme Court to be heard on printed briefs and argument, oral argument being waived, but cause not to be advanced on docket of Supreme Court without consent of parties on both sides.

Falls City, May 20th, '85.

J. R. WEBSTER,
For Pl'ff.

10 A. SCHOENHEIT,
In Personam, and Att'y for the Other Def'ts.
EDWIN S. TOWLE,
In Person.
ISHAM REAVIS,
Att'y for James Cottier.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 107, E. U. S. circuit court, district of Nebraska. James D. Hegler *vs.* George Faulkner *et al.* Stipulation. Filed June 5, 1885. Elmer D. Frank, clerk.

Thereupon afterwards, at the May term of said court, on the 6th day of June, 1885, the following proceedings were had and done, as appears of record on folio 193, Journal "K," of said court, to wit:

Motion for New Trial Overruled.

J. D. HEGLER
vs.
GEORGE FAULKNER *et al.* } 107 E.

This cause come on for hearing on the motion of the plaintiff herein to set aside the verdict and for a new trial herein, and the court, on consideration thereof, does now, on this day, overrule the same.

11 Thereupon afterwards, to wit, on the 6th day of June, 1885, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

JAMES D. HEGLER, Plaintiff, *vs.* GEORGE FAULKNER *et al.*

Be it remembered that on the trial of the above-entitled cause at the January, 1885, term of the district and circuit courts of the United States in and for the district of Nebraska the following proceedings were had:

LINCOLN, NEBRASKA, *January 7th*, 1885.

The above-entitled cause coming on this day to be heard before his honor E. S. Dundy and a jury, J. R. Webster, Esq., appearing for the plaintiff, and Revis, Tole and Schoenheit appeared for the defendants, and testimony was taken as follows:

The plaintiff offers in evidence the exemplification from the

records of the Indian Department of the instructions under which Mr. Stark acted in making the allotment.

Objected to as irrelevant, immaterial.

The plaintiff states that he offers this testimony for the purpose of showing that the man was of full age and was not a minor.

Objection sustained; plaintiff excepts; which exception is hereto annexed, marked A, and made a part of this bill.

The plaintiff offers in evidence a certified copy of (this bill, page 26) the allotment.

Objected to as immaterial and irrelevant; offered for the same reason as above; sustained; plaintiff excepts; which copy is hereto annexed, marked B, and made a part hereof (page 26, this bill).

The plaintiff offers in evidence a certified copy of the patent of the land in controversy.

12 Objected to on the ground that before he can offer a certified copy or a deed record he must show the loss of the original. Objection overruled. Defendant excepts. A copy of the patent is hereto attached, marked Exhibit C, and made a part hereof, page 27, this bill.

The plaintiff offers in evidence the conveyance of this allotment from George Washington to Houston Nuckels previous to the date of this patent, dated April 16th, 1859, the patent being dated in 1860. Objected to on the ground that the allotment was made before the issuance of the patent; that until after the patent was issued the Indian had no title to the land; that if it could have any effect at all it would have to have the effect of a deed; that the object of this is to prove a deed from George Washington to Nuckolls; they issued first an allotment certificate, and on the back of the allotment certificate is issued a certificate that they attempted to introduce to show the transfer to prove a deed thereby; that there is no acknowledgement to this as a deed such as our statutes require, and that there is nothing connecting the assignment of that paper. Sustained; plaintiff excepts; which copy is hereto annexed, marked D, and made a part hereof, being on same sheet as " B " above (page 26, this B.).

The plaintiff offers in evidence a certified copy of the deed from George Washington to Houston Nuckols conveying the land in question, being the north half of section 8, township 2, range 17, containing 320 acres, acknowledged April 16th, 1859, dated April 15th, 1859. Objected to on the ground that the loss of the original is not shown; immaterial; that there was no title in George Washington to convey, and when the patent was issued and he conveyed it to somebody else that was where the title commenced; the offer considered pending; hereto annexed, marked E, and made a part hereof (page 27, this bill).

The plaintiff offers in evidence the deposition of Mr. Stark taken the 22d day of September, 1875.

Objected to on the ground that a legal title cannot be made
13 up from oral testimony, it must be by recorded evidence and a change of title from the original patentee reaching up to the claimants in this case in order to make a *prima facie* case in order to establish the fact that the legal title is in the plaintiff; that — one of the deeds referred to in the deposition the description of the land is not made, and Mr. Stark undertakes to say that he compared the original deed, and the original deed contained a true description, hereto annexed, marked F and made a part hereof. Admitted. Def't excepted (page 27 this bill).

The plaintiff offers in evidence the deeds contained in the deposition just referred to and offered in evidence, the north half of section 8, township 2, range 17.

Objected to on the ground that it does not describe any township; there is no *bona fide* purchaser for value without notice of possession. The deed of George Washington to Nuckols is on record and is in for good, and every subsequent purchaser by the record is charged with the knowledge of that part. Annexed as part of said deposition and made part hereof (page 27 this bill), marked E.

The plaintiff offers in evidence the deed from Nuckoles and wife to Ballard, attached to the deposition last offered.

Objected to as last above. Overruled. Defendant excepts. The deed is hereto attached to said deposition, marked Exhibit —, and made a part thereof, — 27 this bill.

The plaintiff offers in evidence a copy of a deed from A. S. Ballard to James McMillan, attached to said deposition, and objected to on the ground that the original is not accounted for; that this deed shows on its face that it was not entitled for record in Richardson county, and therefore, not being entitled for record, a certified copy could not be offered; that it is acknowledged before a justice of the peace, John D. Johnson, in the county of Green, State of Ohio, that the certificate does not show that the deed was executed accord-
14 ing to the laws of the State of Ohio; that the original would not be competent evidence. Offer pending, which is attached to said deposition and thereto annexed and made a part hereof (page 30 this bill).

The plaintiff offers in evidence a copy of a deed from McMillan to Hegler of the same land in controversy. Objected to on the same ground; they have not shown the loss of the original; it is not certified that this deed was executed according to the laws of the State of Ohio. Sustained. Plaintiff excepts, which is hereto annexed, marked G, and made part hereof (page 31 this bill).

On account of the absence of witnesses for the plaintiff it is agreed that the following testimony may be taken on behalf of the defendant:

CHAUNCEY NORRIS: From May, 1866, to June 1869, I was Indian agent at the Great Nemahaor Iowa agency; knew a half-breed or mixed blood by the name of George Washington; think he was living with my father. He was son of Nagarash, head chief of the Iowas. I knew him all the time I was there and for six months before. I have no means of knowing his age positively, but in my judgment he was from 20 to 22 years old in 1866; in my judgment he could not possibly have been 21 years old in 1859.

Cross-ex.:

When my attention was first called to George Washington in fall of 1865 I was a general merchant in Falls City; was not acquainted with him so long ago as April, 1859, and do not know what his appearance then was.

E. S. TOWLE: I am one of the defendants; was acquainted with George Washington from the fall or winter of 1862; can speak of his age then only by his appearance, size, general make-up, and build; in 1862 he was a slip of a boy, grew to be at least a foot higher afterwards—from eight inches to a foot; when he died he was a man six feet and two or three inches. (Patent for land in controversy produced.) I received it (the patent) from George Washington's own hands. His father Lagarash was with him.

Patent introduced in evidence, H, page 40, this bill (recognized another instrument).

This is a deed from George Washington to Mr. Shoenheit and myself—is the original.

Deed offered in evidence.

Plaintiff objects. The officer taking the acknowledgment does not certify that he personally knows the grantor, nor yet that the grantor's identity is satisfactorily proved to him, and instrument is incomplete. Overruled and deed admitted, Exhibit J, this bill, page 40.

Witness continues:

This (recognizing another instrument) is a deed made February 28, 1868. He had been married since making the first deed. This deed was made because we had doubt whether he was of age when the first deed was made to us, and we got him and his wife to make another deed. When I first knew George Washington he was 19 years old in the summer before. He was much more of a boy than I was—much smaller—not near so tall as I was, and he grew to be 5 or 6 inches taller than I.

Deed of 28 Feb., '68, offered by defendants.

Plaintiff objected; acknowledgment is sufficient and informal and deed is competent to be read in evidence. Overruled; deed admitted. Pl'iff excepts. Deed at page 40, this bill, K.

Cross-ex'm.:

At time I negotiated with George Washington for his conveyance I had information of Hegler's claim on the land. George Washington mentioned making a deed to Nuckolls. I knew Geo. Washington first in the fall of 1862; was not acquainted with the land till 1864. There were no improvements on the land at the time of conveyance to us.

Elisha Deroin deposition offered and read on behalf of defendants, hereto attached and made part hereof, and marked L, page 41, this bill.

Lag-gar-ash deposition offered and read on behalf of defendants, hereto attached and made part hereof, and marked M, page
16 42, this bill.

LINCOLN, NEBRASKA, *January 8th*, 1885.

The court met pursuant to adjournment, the same parties appearing on either side.

The defendants offer in evidence a deed from the plaintiff, Hegler, to William Wilkinson, dated February 6th, 1860, for 100 acres. Received without objection, and the same is hereto attached, marked Exhibit N, and made a part hereof, page 43, this bill.

The defendants offer in evidence the deposition of Daniel Vanderslice, residing in Doniphan county, Kansas, taken the 30th day of May, 1872, hereto attached, marked O, and made part hereof, page 44, this bill.

The plaintiff objects to the answer to the question asking what the witness knew about George Washington selling his land to Houston Nuckols in April, 1859, as immaterial and not responsive. Sustained. Defendants except.

The plaintiff objects to that portion of the testimony contained in the deposition where he refers to the age of the boy as somewhere about fifteen or sixteen years old as immaterial. Overruled. Plaintiff excepts.

The plaintiff offers in evidence the deposition of Sam'l M. Irwin, of the same place of the last witness, Doniphan county, Kansas, page 44, this bill.

The plaintiff objects to that portion of the deposition where he refers to the age of George Washington at this time on the ground that the witness cannot give his convictions, and immaterial. Overruled. Plaintiff excepts.

The defendants offer in evidence the deposition of Major Daniel Vanderslice, taken in 1875. This is the second deposition of this witness taken in Doniphan, Kansas, the other one is dated the 10th day of May, 1872, hereto annexed and marked P, and made part hereof, page 45, this bill.

17 The plaintiff objects to that portion of the deposition where reference is made to the sale of said land by said Washington in 1859 as immaterial. Sustained. Defendants except.

J. H. BROADY, on behalf of plaintiff, testified: I am J. H. Broady referred to in the deposition of Mr. Hegler; remember receiving a package of documents of title; could not say what deeds they were; they were the deeds he refers to in his deposition; part of his chain of title; I could not say what needs. Witness: I have here a paper; cannot say from recollection whether the original of which this purports to be a copy was there or not; cannot say whether the instruments in the package made a complete chain of title or not. I have the impression on my mind that it showed the title. The instruments sent us by Mr. Hegler are lost; have searched for them many times before this cause was tried the first time. I was one of the attorneys; searched for them everywhere; am thoroughly satisfied they are lost.

Cross-ex'm.:

My recollection is they came from Mr. Hegler in an express package with some depositions; do not remember what Mr. Stark says (about their being attached to his deposition). They came from Cincinnati in a big envelope, and the depositions around them, I think; do not remember what Mr. Stark says in his depositions about my having advised him that I had placed these deeds in the clerk's office, Falls City, and that they were lost. I cannot imagine why I should have placed them in the clerk's office of Richardson county, if I had told him I had done so. I do not remember telling Mr. Stark that that was done. My recollection is that at some time the deeds were conveyed in some package with depositions sent from Cincinnati to us, improperly, as we thought, and we sent them down to Falls City, and I have an impression that we might have sent the deed there at the same time through some mistake. I might possibly have said so; I had that impression at one time. I have
18 examined the files of district court, Richardson county; found some things there; Mr. Thomas was in partnership with me then; think Mr. Thomas has not got the deeds. He was senior member of our firm. It is possible, but not probable, that he has the deeds; cannot say from memory how many deeds there were; more than one; three or four, perhaps more; don't remember how many papers. It seems to me the deeds and depositions were in one package; I have that impression on my memory. I am a lawyer; presume I knew better then than now what I received. Have been fighting this case twelve years. I kept them all in a package, and think I carried it to Falls City and left it somewhere—forgot it—and that was the way they got lost, I have concluded; discovered the loss about the time the case was tried the first time.

It is not a fact that I did not have any of the deeds before Mr. Stark discovered that the description was incorrect in the deeds. I think they were lost before we found any difficulty in that description; then we began to surmise the discrepancy; we discovered the loss after that. It is a long time before I noticed anything about the description; think it was one time going out of Omaha. I do not think Mr. Stark wrote me first about that. I think you (defendant Shoenheit) wrote first about that. I have no recollection

what Stark wrote me the 20th of August, 1875; remember he sent me some papers and wanted of me a tracing, but think all those letters were in response to letters from me. I think the time I discovered the loss of the deeds was at the first trial before Judge Gantt, in district court, Richardson county, and started into the trial the second time and dismissed without prejudice. The present is a second action. My recollection is that we discovered the loss in the first trial, and that we stipulated something in reference to George Washington, when Gantt was on the bench, in '72 or '73, before the case went to the Federal court. My recollection is that I first
19 knew of mistake in the description when the case was in the Federal court; remember of going to Omaha for purpose of trying the case—the former action between these same parties—and that I discovered the mistake in reading over the transcripts from the records; did not ascertain it from the original deed; do not know whether I ever read the original deed or not; could not say from recollection whether I examined the original deeds or not or looked to their acknowledgment to see that they were properly acknowledged; do not remember any mistake in the execution of the deeds or whether they were acknowledged; could not say how much I examined them; have a strong impression upon my mind I saw they were deeds relating to Mr. Hegler's title to the lands in controversy; could not fix the year that I ascertained the defect of the record; according to my recollection, it was some time after the cause was removed to the Federal court and before we commenced the last trial before the dismissal; have forgotten whether it was in 1872 or not, or when it was removed; think the case had been in the Federal court a year or two; it was while Judge Gantt was on the bench; my impression is during his first term; think the case was commenced in his first term. My recollection is that I got the package about the time of the first transmission of the first depositions before the first trial of the case, about 1870, I should judge; think it was with the same express package that contained the depositions filed November 19th, 1870; do not remember anything after that, when they were lost nor how many nor which ones of the deeds.

Redirect:

The deeds were missed before Mr. Thomas and myself dissolved partnership; we looked for them, could not find them, and have never since found them.

The plaintiff offers in evidence the deposition of J. D. Hegler. The same is objected to, so far as it refers to the allotment,
20 as irrelevant; overruled; which is hereto annexed, marked Q, and made part hereof; attached, page 33, this bill.

The plaintiff offers in evidence the deposition of Wm. M. Stark, taken November 8, 1870, which is hereto annexed, marked R, and made part hereof, page 34, this bill. The second question is objected to as irrelevant; sustained; defendant excepts; page 34, this bill.

The third question is objected to as irrelevant; overruled. De-

fendant excepts as to the first part. The latter part of the third question is objected to irrelevant; sustained as to that portion relating to the officer of the Government taking the censes. The court ruled that that census could not bind anybody as to his age unless the age was given by himself; then it would be a declaration by the party.

Question 4 is objected to. No ruling.

The plaintiff offers in evidence the exhibits attached to and part of —, page 35, this bill, the certificate of allotment, and original census list. Objected to as irrelevant; that it does not state that it is the voluntary act and deed of the party signing it; that the certificate of acknowledgment is defective, invalid, and void; that it is an unofficial document and nothing to give it authenticity in the court of law; it does not purport to be from the office of the officer of the interior; anything that is of record that is of any value cannot go out.

Mr. WEBSTER: The official list is offered.

Mr. SHONHEIT: It is not certified to, and we object to it; it does not show any authenticity of any kind; immaterial and irrelevant.

Sustained. Plaintiff excepts. Copy annexed, marked S, page thirty-five, this bill.

Mr. WEBSTER: The exclusion of it is not because it is not sufficiently authenticated, but that it is immaterial paper.

The COURT: Yes; the plaintiff excepts, which is hereto annexed and made part hereof, marked Ex. S, page 36, this bill.

21 The plaintiff offers in evidence a certified copy of the deed from George Washington to Houston Nuckols. Objected to on the ground that the loss of the original is not accounted for. (Same annexed, marked Exhibit E above, and made part hereof. See page 27, this bill.)

E. W. THOMAS, on behalf of the plaintiff, testified:

I was one of the firm of Thomas and Broady, counsel for Hegler; remember receiving a package of deeds and documents of title from Cincinnati; they are not in my possession or under my control; know they were sent to the office of the clerk of district court at Falls City; that is the last I saw of them; my recollection is the deeds and depositions were received at my office by express and were sent down to Falls City or taken to the office of the clerk of the district court; the deeds and depositions were in the same paper; I think were attached to the depositions; not quite certain about that; subsequently I examined the files in the clerk's office at Falls City; could not find them; Mr. Broody examined and he could not find them; the clerk could not find them; have never never seen them since.

Cross-ex'm.:

Am not certain that the deeds were attached to the depositions; think they were; do not remember the object of filing the deeds in

the clerk's office; my recollection is that it was because they were attached to the depositions; am not certain about that; can't give exactly the date of receipt of the deeds; may have been in 1870 or '71; do not know whether they were with the first or second batch of depositions; do not remember what Mr. Stark swore to in his depositions, it is so long ago; I do not remember his testimony, so do not know as I would remember the first deposition if I should see it. (Handed a set of depositions.) I do not remember whether these are the first or second depositions, and have not examined these for years; cannot state how many deeds there were; think the deeds were in the same package with the depositions, and, if I am not mistaken, they were attached; if I remember, Mr. Broody
22 and I read them over; do not remember whether they were a part of the depositions, it is so long ago, and I have not thought of it since; do not think he would have put the deeds in the clerk's office if they had not been attached to the depositions; cannot identify any particular deed as in the package, nor the name of grantor or grantee in any of the deeds, nor how many there were, nor whether there were any exhibits with the first depositions or not; do not think that if they were not attached to the depositions nor referred to in them that I would have filed them in the clerk's office, but have no recollection about that; do not know that it would have been wrong to have filed them in the clerk's office if they were not exhibits to the depositions; my recollection is that Mr. Broody and I both examined into the clerk's office at Falls City many years ago and could not find them; think Mr. Broody did most of the work in reference to the matter; think Mr. Broody and I dissolved partnership about 1875 or '76; remember we were in partnership and dissolved amicably, but cannot give the exact date.

Plaintiff offers in evidence copy of a deed of George Washington to Houston Nackalls.

Defendants object that loss of the original is not sufficiently accounted for and Charles F. Walters is not a justice of the peace. Overruled. Defendants except.

Deed hereto attached, marked Exhibit E, page 27, this bill.

The plaintiff offers in evidence the second deposition of Wm. M. Stark, hereto annexed, marked Exhibit F, and made part hereof.

The 4th question is objected to as not the best evidence.

The COURT: I think there is evidence enough to justify them in showing what the deeds were; I think there is some testimony that accounts for the absence of the original; I think that they have a right to show the contents if they can prove the execution of the deed—what it contains; they have a right to do that, and if they cannot do that they must fail.

23 Exhibit A, in connection with this deposition, is offered in evidence, objection to which is reserved until all the deeds are in.

The defendants ask at the close of the reading of the deposition that all the testimony that had just been read from the deposition be excluded from the jury; that relates to the deed from Nuckols to

Ballard as incompetent to prove the execution of the deed, or that any deed was ever made by Nuckols to Ballard. Overruled.

The plaintiff offers in evidence the deed from Nucklos to Ballard; objection reserved until all the deeds are offered; attached to deposition as Exhibit B to dep. F and part thereof (page 27, this bill).

The plaintiff offers in evidence the deposition of J. D. Hegler; the second deposition received without objection, and the same is hereto attached, marked Exhibit T, and made a part hereof, page 37, this bill.

The plaintiff offers in evidence the deposition of L. A. Ryan, of Falls City, Nebraska. The defendant objects to the memorandum in the caption of the deed that was put there by the recorder as no part of the deed. Overruled. The deed is hereto attached, marked Exhibit N, and made part hereof (37, this bill).

The plaintiff offers in evidence the deposition of Charles F. Walther; received, and the same is hereto attached, marked Exhibit N 2 (page 38, this bill).

The plaintiff offers in evidence the deposition of Mr. Stark, taken on the 8th day of November, 1870, hereto attached, marked R, and made a part hereof (page 34, this bill), to which he attaches the original census list. Objected to. Sustained.

The plaintiff offers in evidence Exhibits "A," "B," and "C" to the deposition, being the deed from Nuckols to Ballard, from
24 Ballard to McMillan, and from McMillan to Hegler, — parts of said exhibit (pages 30 & 31, this bill); also the answer of the defendants, filed in the State court December 29th, 1871, a certified copy of the answer in this same controversy, dated December 29th, 1871, which is hereto annexed, marked W, and made part hereof (47, this bill); also the tax receipts for the payment of taxes by Hegler, and his grantors previous to him, on this land for the years 1863, 1864, 1865, 1866, and 1868, 1867 being absent, hereto annexed, marked X 1, 2, 3, 4, & 5; received, and the same are hereto attached, marked Exhibits A, B, C to def'ts, Nov. 8, '70, W, X 1, X 2, X 3, X 4, X 5, and made parts hereof (page 39, this bill).

The plaintiff offers in evidence the deposition of W. R. Kane upon the rental value, and it is agreed that C. H. Jeffery, Henry C. Smith, E. C. Nutter, Henry C. Shrader, and E. E. Metz will testify the same as Mr. Kane; the depositions are hereto attached, marked Exhibit Y (page 39, this bill).

Here the court adjourned until to-morrow morning at 10 a. m.

LINCOLN, NEBRASKA, *January 9th*, 1885.

The court met pursuant to adjournment, the same parties appearing on either side, and the following proceedings were had:

The answer above referred to is objected to.

The plaintiff states that he offers to show that defendants purchased subsequent to the claim of Hegler, so that the defects in the deeds clear down to Hegler would not figure, provided that they were good between the parties, and also that there is an admission in there that the deeds are admitted to have been made clear down

to Hegler. Objection sustained. Plaintiff excepts. Exhibit W above (47, this bill).

The plaintiff offers in evidence sections 42 and 43 of the acts of 1856 of the Territory of Nebraska at page 165; received; a copy of same is hereto attached, marked Exhibit "Z" (page 48, this bill).

The plaintiff asks for another purpose that the original
25 census list be admitted, because on further examination it is found that there are two George Washingtons on the list; that Mr. Vanderslice says that this list was approved by him and sent to Washington, and yet he says that he did not know of but one George Washington; that there appears to be two George Washingtons, one about the age contended by them and the other by us. Objected to as immaterial; overruled; defendants except; which is annexed hereto, part of the deposition of Stark, Exhibit S (page 35 this bill).

The plaintiff offers in evidence a copy of a deed from Nuckols to Ballard. The defendant makes the same objection to this deed as to the others; the one from Nuckols to Ballard has no description in it, and it appears to have been executed three days before the allotment was made.

The COURT: I will hold that if the grantor had no title at all at the time of the conveyance, and he afterwards procured a title that would inure to the benefit of the grantee, it would be immaterial whether he had a title or not if he afterwards acquired it.

The defendant further objects to all these deeds on the ground that there is no sufficient foundation laid for the introduction of anything but the original. Overruled; defendant excepts.

The defendants object to the deed from Ballard to McMillan that it is defective for the reason that it was not entitled to be recorded in the office of the clerk, for the reason that the certificate of the justice of the peace does not certify that the deed was executed according to laws of the State of Ohio, and this paper that they produced is simply a blank piece of paper. The only evidence of that deed is the evidence of this man Stark, who says that it was done in his office and that these witnesses are all dead (page 30 this bill).

26 The deed from McMillen to Hegler is defective for the reason that it is not properly recorded; that it was not entitled for record and cannot be introduced in evidence at all; that the attesting witnesses are not accounted for, and they do not even name the witnesses to the deed. Overruled; defendant excepts (G, 31, this bill).

With this the plaintiff rests, and no further or additional evidence being offered by either side.

C. A. POTTER, *Reporter.*

"A."

Instructions.

DEP'T INTERIOR,
OFFICE INDIAN AFFAIRS, *May* 14, 1856.

To Joseph L. Sharp:

Abstract.

1st. Sets forth, 10th, that by the 10th article, treaty Prairie du Chein, July 15, 1830, reservation between the Nemaha river was granted to half-breeds of Iowa, Omaha, and other tribes of Indians.

2nd. By the 5th, 4th, of act of Congress of July 31st, 1854, for making appropriations, for Indian Department and fulfilling treaty stipulations, the President is authorized to cause to be fulfilled the above treaty stipulations by causing the reserved tracts to be surveyed and allotted to the proper persons in fee simple.

3rd. To enable the President to comply with the act it is necessary to ascertain the number and names of the half-breeds and mixed bloods entitled to participate, you (Sharp) have been appointed commissioner to act under following instructions:

To give notice for all persons interested to appear before you with their applications and evidence.

Before commencing to take testimony consult with the Indian agents and chiefs of the tribes.

27 In making report have regard not merely to proof applicants may submit, but also to information from above-mentioned and other sources you consider reliable.

You will be furnished by the superintendent of Indian affairs at St. Louis with all the information he may discover bearing on the subject.

I direct that you prepare your report in full to embrace a list containing names of all applicants, arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe, place of residence, who are orphans or wards, and such other facts as you consider useful and proper. In every case, whether admitted or rejected, give briefly your reasons. Transmit your report, with evidence taken, to this office without delay. The several Indian agents for the particular tribes will be instructed to render you all proper assistance in the premises. Before commencing your duties take and subscribe an oath of office before some officer authorized to administer oaths that you will support the Constitution of the United States and faithfully discharge your duties as such commissioner; which transmit to this office.

GEO. W. MANYPENNY, *Com.*

Authentication under seal Indian Dep't, July 17, 1876, as true copy.

ZACHERIAH CHANDLER,
Sec'l'y Interior.

" B."

Abstract certificate of allotment (copy from deed record), date April 15th, 1859, to George Washington, half-breed of Iowa tribe, 320 acres, under treaty and act of Congress (above mentioned), known in Government surveys as north half sect. 8, township 2 north, range 17 east.

WM. M. SHARP,
Special Agent.

(B 2 D). Assignment written upon above certificate of allotment, by George Washington, "to whom within certificate was
28 issued," to Houston Nuckolls and his heirs forever, the land herein described, and authorize him to receive patent therefor. In presence of 2 witnesses.

his
GEORGE x WASHINGTON.
mark.

Acknowledged before justice of the peace, Charles F. Walther, Richardson Co., Nebr., Apr. 16, 1859—regular, except the word "voluntary" act and deed is omitted—being acknowledged as "his act and deed."

Duly certified as true copy from Book F, page 35, miscellaneous record of county clerk's office, by Ruel Ninems, Co. cl'k, under seal April 12, 1876.

Excluded; plaintiff excepts.

" C."

Patent.

United States to George Washington, his heirs and assigns, forever, north ½ sec. 8, t'p 2 N., R. 17 east, 6th P. M., Sept. 10, 1860, by President James Buchanan.

Duly authenticated copy, May 1st, 1872.

WILLIS DRUMMOND,
Com. General Land Office.

(Copy.)

" E."

Deed.

George Washington to Huston Nuckolls, same lands, consideration, $600, in fee simple; covenant of warranty of title, April 16, 1859; regular in form, and execution acknowledged April 16, 1859, before Ch's F. Walther, justice of peace Richardson Co., Nebr.; recorded April 25th, 1859, Book E, page 333, deeds record, Richardson Co., Nebr.; copy certified by county clerk Richardson county, Nebr., Apr. 23, 1875. The acknowledgment contained these words beyond the ordinary words of such certicate, viz: "I further state that I am twenty-one years of age."

"F."

Deposition Wm. M. Stark, taken — Cincinnati, Ohio, Sept. 20th to 22nd, 1875, before Chas. F. Seybold, notary public, Hamilton Co., Ohio, in this cause; formal parts and notice omitted and reduced to narrative form as follows:

1. My name is William M. Stark; age, 56; reside Cincinnati, Ohio.

2. Am same Wm. M. Stark who formally gave deposition
29 in this cause in State court, October or November, '70, and again April 26 and 27, '72.

3. Am acquainted with north half section 8, t'p 2 N., of range 17 E., 6th P. M., Richardson county, as special commissioner, appointed by Commissioner of Indian Affairs for half-breed reservation between the Nemaha rivers, in Nebraska. I allotted said land to George Washington, mixed blood, Iowa tribe, and delivered to him in person on the reservation my certificate of such allotment, signed by me as such special agent. I am enabled to testify explicitly to this fact from a copy of the census list delivered to me by the Com. of Indian Affairs containing a list of mixed bloods entitle to participated in the allotment of land between said rivers; such census list I now hold in my hand, dated Office of Indian Affairs, Feb'y 4th, 1858. On the census list is written in my hand: "Allotted to George Washington, mixed blood, Iowa, north half sec. 8, range 17 east, to 6th P. M., 320 acres," copy of which I have attached as a part of this my deposition.

4. I remember a deed of conveyance from Houston Nuckalls to A. S. Ballard, then of Aspinwall, Nebr. It was signed and sealed by Houston Nuckalls and Mary, his wife, acknowledged before a justice of the peace, Richardson county, Nebr., April, 1859. It conveyed to A. S. Ballard the north half of said section 8, and north half of sec. 9, in same township; this deed, with others belonging to Ballard, was in my possession for some time in fall of 1859, at my office, Xenia, Ohio. It and other exhibits with my first depositions was forwarded to Thomas and Broady, attorneys-at-law, Brownville, Nebr., and, as I am informed and believe, delivered to the clerk of the court, Richardson Co., Nebr., and afterwards lost or stolen.

5. I am able to give description of the land contained in and conveyed by said deed from then having made a copy of the de-
30 scription of the land conveyed by said deed while it was in my possession. The description was the north half of section 8 and the north half of section 9, all in t'p 2 north, of range 17 east, of sixth principal meridian; a number of other deeds from Nuckolls to Ballard were then in my possession, and I copied from the deeds description of the lands conveyed, and compared descriptions with my record of attachments and found the descriptions correct; Nuckolls purchased of George Washington, mixed Iowa, the north ½ of sect. 8, t'p 2 N., of range 17 E., and of Now-to-che-chin, ¾ blood Iowa, the north ½ of sec. 9, same township.

6. This paper (Ex. A, this dep.) is not a correct copy of the deed of Nuckolls to Ballard, formally in my possession, in this, that the

word two between the words "township" and "north" is omitted; with the word two inserted between "township" and "north" it would be a correct copy of that deed.

7. It fails to be a correct copy because the word two is omitted between the words township and north. If the original deed had been correctly recorded the word two would have been there between "township" and "north," as it was in the original which was in my possession, forwarded with other deeds and papers with my first deposition mentioned. If the word two was inserted between "township" and "north" in description of the land, then Ex. A would be a correct copy of the description of land in the original deed from H. and Molly Nuckolls to A. S. Ballard.

8. George Washington, mixed Iowa, had possession of said land from date of allotment (Apr. 15, '59) till he sold to Nuckolls, Apr. 16, '59; Ballard purchased the land of Nuckolls Apr. 20, '59, sold and conveyed the same to James McMillen Sept. 16th, '59, and said McMillan sold and conveyed the same north half of sec. 8, t'p 2 north, of range 17 east, of 6th P. M., to J. D. Hegler, Oct. 13, '69, who took and held possession and paid taxes on said land until defendants claimed and took possession. The deed of Ballard and wife to McMillen conveying the north half of said sec. 8 was
31 written in my office, at Xenia, Ohio, in my presence, about Sept. 1st, '59. Ballard wrote the deed and copied the description of the land from the deed of H. and Molly Nuckolls to Ballard. After the deed was written I held Ballard's deed to McMillan and, Ballard reading from Nuckolls' deed, we compared description of the land, to wit, the north half of section 8, town. 2 north, of range 17, and found it was correctly copied. Ballard then took the deed to his residence, Jamestown, Green county, Ohio, and, Sept. 10th, '59, acknowledged it before John D. Johnson, justice of the peace, Green Co., Ohio, witnessed by said Justice of the Peace Johnson, and James Hibben. All of Ballard's deeds remained in my possession for some time afterwards. In winter of '59–'60 Ballard delivered the deed, properly acknowledged, to McMillan, in my presence and in my office. In the latter part of Sept., '59, I directed McMillan to take the deed to John Boyd, clerk of court of common pleas, Green county, Ohio, and — him certify John D. Johnson was an acting justice of the peace of Green county at the time of taking the acknowledgment of said deed before sending it to Nebraska for record.

9. Said John D. Johnson, the justice of the peace, and James Hibben, the subscribing witness and officer before whom the acknowledgment was taken, are both dead. John Boyd, clerk of the court, Green county, O., who certified John D. Johnson's official character, and Alexander S. Ballard, who made the deed, and James McMillen, who received it, are all dead. Mrs. Mary Jane Ballard, widow of A. S. Ballard, is living in Jamestown, Green Co., Ohio.

(Signed) WM. M. STARK.

EXHIBIT "A" ABOVE DEPOSITION.

Warranty Deed, N. ½ Sec. 8 & N. ½ Sec. 9, T. 2, R. 17. Filed for Record May 24, 1859.

H. Nuckolls and Wife to A. S. Ballard.

Know all men, &c., * * * H. Nuckalls and Mollie Nuckalls, * * * for consideration of $1,200, * * * acknowledged, * * * sell and convey to Alexander S. Ballard, * * * 32 his heirs, * * * north half of section eight and north half of section nine, all in township — north, of range seventeen east, of 6th P. M. (with special warranty).

Dated 20th day of April, 1859.

Witnessed, to wit: Acknowledged, Richardson county, Neb., Apr. 20, 1859, before justice of the peace in due form.

Above copy certified from Book E, page 383, deeds recorded, Richardson Co., Neb., by L. A. Ryan, Co. clerk, Apr. 23, '75.

EXHIBIT "B" TO ABOVE DEPOSITION.

Warranty Deed. Filed for Record Feb. 8, 1860.

A. S. Ballard to James McMillen.

Alexander S. and Mary Jane Ballard, his wife, in consideration $1,000, to James McMillan, his heirs, &c., the north half of section 8, township 2 north, of range 17, Richardson Co., Neb., 320 acres (special warranty).

Dated Sept. 16, '59.

ALEXANDER S. BALLARD.
MARY JANE BALLARD.

Witnesses:
JAMES HIBBENS.
JOHN D. JOHNSON.

Acknowledgement.

GREEN COUNTY, OHIO.

Before John D. Johnson, justice of the peace, said county, personally appeared Alexander S. Ballard and Mary Jane Ballard, — acknowledged the signing and sealing of the above conveyance to be their voluntary act and deed, &c.

Apr. 16, '59.

JOHN D. JOHNSON, *J. P.*

GREEN COUNTY, OHIO, *Oct.* 14, '59.

John Boyd, clerk court common pleas, said county, certifies official character of J. D. J., acting justice of the peace of said county, &c., at above date, and genuineness of his signature.

[SEAL.] JOHN BOYD, *Clerk.*

Above copy duly certified from Book I, page 194, deeds, Richardson Co., Neb., Apr. 23, 1875, by L. A. Ryan, Co. clerk, said Co.

33 EXHIBIT C, ABOVE DEPOSITION.

OFFICE OF INDIAN AFFAIRS, *Feb.* 4, 1858.

A list containing the names of half-breeds, who, upon testimony presented to this office, are entitled to participate in the allotment or assignment of lands within the reservation between the Nemahaws.

Names.	Family.	Sex.	Age.	Degree.	Band.	Rem.
* *	*	*	*	*	*	* *
Lag-gar-ash	Father	Male	55	¾	Iowa	
George Washington	Son	Male	20	Mixed	"	
* *	*	*	*	*	*	
George Washington		Male	10	½	Omaha	No land allotted on cash list.

"G."

Warranty Deed. Filed for Record Feb. 8, 1860.

James and Malinda McMillan to J. Dice Hegler.

James McMillan and wife Malinda, Xenia, Ohio, in consideration of $1,000 paid by J. Dice Hegler, bargained, &c., and convey to J. Dice Hegler, his heir, all real estate in Richardson Co., Neb., described as north half of section 8, t'p 2 north, range 17, 320 acres; special warranty, dated 13th Oct., 1859; signed by grantors in presence of two witnesses; acknowledged Green county, Ohio, before James Kyle, justice of peace, in due form, Oct. 18th, 1859; certified Green county, Ohio, Oct. 14, 1859, by John Boyd, clerk common pleas court, to official character of James Kyle and genuineness of his signature.

Copy certified from page 195, Book I Deeds, Richardson Co., by L. A. Ryan, Co. clerk, Apr. 23, 1875.

34 "Q."

Depositions, formal parts and questions omitted, taken Sept. 20–22, 1875.

J. D. Hegler is my name; age, 40; residence, Hamilton Co., Ohio, formally gave deposition in this case in State court; am acquainted with the north half section 8, t'p 2 N., of R. 17 E., Richardson county, Neb., of the execution of a deed from Houston Nuckolls to Ballard; I only know that Ballard had a deed from Nuckolls and his wife; had it in my possession, and think it was sent with the first deposition of W. M. Stark to Thomas and Broady, Brownville, Neb., and am informed and believe that the deed, with other papers, was lost or stolen; I was present when the deed from Ballard and wife to McMillan was written, and saw Ballard copying the description of land from the deed of Nuckolls to himself, and heard Ballard

and W. M. Stark comparing the description of the land in his deed to McMillan with that in his deed from Nuckolls; do not remember the description as compared; did not note it particularly; I do not know who had possession of said land prior to Oct. 13, '59; from that time I held possession and paid the taxes till defendants took possession. Of the parties and subscribing witnesses to the deed of Ballard to McMillan, Ballard the grantor, Hebber the witness, Johnson the justice, and Boyd the clerk, who certified, are all dead; Mrs. Ballard lives at Jamestown, Green Co., Ohio. The original deeds constituting my chain of title were all in my possession, viz: The certificate of allotment of N. ½ of section 8, t'p 2 N., of R. 17 E., to George Washington, 320 acres; the deed from him to Houston Nuckolls, the deed from Nuckolls and wife to Ballard, the deed from Ballard and wife to McMillan, and the deed from McMillan and wife to me. These were all expressed with Wm. M. Stark's first deposition in State court to Thomas and Broady, attorneys-at-law, Brownville, Neb., who informed me they received them and that all said papers were lost or stolen.

35 "R."

Depositions taken Nov. 8, 1870, Wm. M. Stark, formal part omitted.

1. William M. Stark is my name; age, 53 years; residence, Cincinnati, Hamilton county, Ohio.

2. July 8, 1859, I was special agent of the Indian Department of the United States to assign or allot lands in the half-breed Indian reservation, between the Great and Little Nemaha rivers in Nebraska, for the benefit of such half-breed and mixed-blood Indians entitled to the same under the 10th article of the treaty of Prairie Du Chien of July 15th, 1830. I was appointed Aug. 4th, 1857, by Hon. J. W. Denver, Com. of Indian Affairs, and continued to be such special agent until the middle of July, 1859, when I made my final report and all my papers to the Com. of Indian Affairs at Washington, including all certificates of allotments to the half-breeds or mixed-blood Indians which had not been delivered to the parties entitled, who had failed to appear and be identified and receive certificates.

3. I know all about the allotment of land between Nemahas on the half-breed reserve in Nebraska to the mixed-blood Indians; was the special agent to make the allotments, and delivered all the certificates of allotments that were delivered on the ground.

4. I know the north half of section 8, t'p 2 north, of R. 17 E., in Richardson county, Nebr., in the half-breed tract—was allotted to George Washington, of mixed blood, Iowa tribe, and certificate therefor was delivered by me to him in person, April 15, 1859. I should judge him to be more than 21 years of age from his appearance.

(The following excluded on def't's objection; pl'ff excepted:) I also judge that he was more than 21 years old at that time from official list containing the names of half-breeds who, upon testimony

36 presented to the office in Washington, were regarded as entitled to participate in the allotment of lands within the reservation between the Nemahas, which list is dated Feb.

4th, 1858, and shows that George Washington was at that time twenty years of age.

I saw him frequently afterwards and am satisfied in my own mind that he was between twenty-two and twenty-three years of age when he received the certificate for the land above described.

5. The list here (annexed Exhibit A) is the list sent me from the Indian Department, dated Feb. 4th, 1858, containing the names of half-breeds entitled to allotment of land in the reservation between the two Nemahas. I received this list by due course of mail and acknowledged its receipt Feb. 14, 1858. The George Washington whose name appears on the list as male, 10, ½ Omaha, never received any allotment of land in said reservation. I attach the paper marked "Ex. A" to this, my deposition, as a part thereof.

6. George Washington, to whom said land above described was allotted and to whom I delivered the certificate for the same, was of mixed Indian blood and of the Iowa tribe, son of Lag-gar ash, on the attached list as 55 years of age, ¾ degree of blood, Iowa.

7. The annexed paper, Exhibit B, is the certificate of allotment delivered by me to George Washington, a half-breed or mixed-blood of Iowa tribe, on April 15, 1859, to which my signature is signed by me in my own proper hand as special agent; he is the same George Washington to whom I have referred in my answer above, who was entitled to the land above described in said certificate. I attach the paper marked "Ex. C" to this, my deposition, as a part thereof.

Exhibit A to above deposition offered and excluded; pl'ff excepted.

"S."

OFFICE OF INDIAN AFFAIRS, *Feb.* 4, 1858.

37 A list containing the names of half-breeds, who upon testimony presented to this office are regarded as entitled to participate in the allotments or assignments of lands within the reservation between the two Nemahas.

Name.	Family or single	Sex.	Age.	Degree of blood.	Band.	Remarks.
* *	*	*	*	*	*	* *
Lag-gar-ash ------	Father	Male	55	¾	Iowa	
George Washington.	Son	Male	20	Mixed	Iowa	
* *	*	*	*	*	*	* *
Elizabeth Rogers--	Family	Female	38	½	Omaha	Elizabeth Rogers on original bill, page 10.
George Washington.	--- ----	Male	10	½	Omaha	

Exhibit B to above deposition.

Original allotment certificate, date 15 April, 1859, to George Washington, mixed blood, of the Iowa tribe, 320 acres, viz., north half of section 8, township 2 north, range 17 east.

WM. M. STARK,
Special Agent.

On back of same as follows: For value received I, George Washington, to whom the within certificate of allotment of half-breed land was issued, do hereby sell, assign, transfer, and convey unto Houston Nuckolls, his heirs and assigns forever, the within certificate and the land therein described, and authorize him to receive the patent therefor.

Given under my hand and seal this 16th day of Apr., 1859.

his
GEORGE x WASHINGTON.
mark.

WM. T. NORRIS.
WM. K. CAIN.

TERRITORY OF NEBRASKA, *County of Richardson:*

Before the undersigned, a justice of the peace within and
38 for Richardson county aforesaid, appeared George Washington, who is personally known to the undersigned to be the identical person whose name is subscribed to the foregoing assignment and acknowledged the same to be his act and deed.

St. Stephens, Apr. 15, 1859.

CHAS. F. WALTHER,
Justice of the Peace.

T.

Deposition, formal part omitted, taken July 2, 1873.

J. D. Hegler is my name; age, 37; reside, Cincinnati, Ohio; plaintiff in this action. The deed from George Washington to Houston Nuckalls, and also the deed from Nuckalls to Ballard; also the deed from Ballard to McMillen, and the deed from McMillan to myself, each of which conveyed the land in controversy forming the chain of title I had in my possession from the time I purchased said lands from McMillan in 1859, till about the 8th of November, 1870, when I sent them by express to Thomas and Broady, my attorneys, Brownville, Neb., and I have not since seen or had possession of them or either of them since.

"U."

Deposition of L. A. Ryan, formal parts omitted, taken Sept. 20 1875.

L. A. Ryan is my name; age, 34 years; residence, Falls City, Nebr.; county clerk and register of deeds, Richardson county, Neb. This paper, Exhibit A, attached to this deposition is a correct transcript from the deeds of record of Richardson county, Neb. I have looked at and examined the original record, from which Exhibit A,

attached, is copied, and cannot say whether the omission of the number of the township, omitted in the description in the body of the deed, was an error in the recording or not. There appears to be no space left for the omission if it were in the original deed.

I can give a *fac-simile* copy of the caption and first two lines and the description of the land taken on tracing paper from the
39 deed record, of which Exhibit "A" is a copy, which I have made on tracing paper and here hand the commissioner, attached — Exhibit B.

Mr. William H. Mann, the recorder, who recorded this deed, accustomed to note on the record such omissions, defects and mistakes in deeds, but I have found many which he had not noted.

No such note or memorandum of the recorder appears on the record of which Exhibit A is a transcript.

Cross-ex'm.:

The "caption" of the deed, as I have termed it, is a memorandum made on the record by the clerk, and is not a part of the deed.

U 2.

Deposition, formal ports omitted, Charles F. Walther, taken Sept. 20, 1875.

Charles F. Walther is my name; age, 40; resident Richardson Co., Neb.; am the Chas. F. Walther who took the acknowledgment of George Washington to Houston Nuckolls, Apr. 16, 1859; George Washington himself made no representation as to his age; it was the interpreter; Houston Nuckells requested the interpreter to ask him if he was of age; the interpreter asked him something in Indian, and Lar-gar-ash, George Washington's father, replied in Indian; then the interpreter said it was all right. George Washington appeared to be a tall, grown boy. After the interpreter said "All right," Houston Nuckolls told me to put in the deed the words "I am twenty-one years of age." How it was put in the acknowledgment I cannot explain. The words were intended to refer to George Washington; my mind appears to have been in confusion. I do not know where W. W. Buchanan, witness to the deed, is; the other witness, W. T. Norris, is in Washington Territory or Oregon.

Cross-ex'm.:

Do not recollect the interpreter; it was either Robert White Cloud, Frank Dupies, or Elijah Deroin; the interpreter was not sworn; George Washington did not understand the English language; I did not know his age.

(The following words plaintiff objected — as hearsay and incompetent; objection overruled, and plaintiff excepted, viz:)

40 I understood afterwards that he was between 14 and 16 years of age; George Washington himself made no representations as to his age or said a word; Lag-gar-ash, when the interpreter asked him in regard to his age, answered for him.

Redirect:

(To plaintiff's counsel:) In saying to you some time ago that George Washington represented himself to be of age at the time of making the deed I had reference to the conversation as given more fully in this testimony; I stated that he was pretty well grown up, and could be taken by a casual observer as of age.

"X."

Tax receipts, abstracts, formal parts omitted.

Description of Land.

	Section.	Tp.	R. E.	Year.	Date,	Paid by—	Am't.	S'gd by Co. T.
N. half.....	8	2	17	1863	14 May, 1864	James D. Hegler..	4 95	F. A. Tisdel, Sr.
N ½ & part of E. ½ of N. W. ¼, with other land.	8	2	17	1864	28 Apr., 1865	W. G. Mann	44 39	F. A. Tisdel, Sr., Tr.
N.E. ¼ & 60 acres off E. side N. W. ¼ with other land.	8	2	17	1865	30 Apr., 1866	James D. Hegler..	48 53	D. R. Holt, Tr.
N.E. ¼ & 60 acres off E. side N. W. ¼.	8	2	17	1866	3 May, 1867	Jas. D. Hegler.....	15 67	D. R. Holt, Tr.
N.E. ¼ & 60 acres off E. side N. W. ¼.	8	2	17	1868	21 Apr., 1869	J. D. Hegler.....	29 43	D. R. Holt, Tr.

"Y."

Deposition, formal parts omitted.

William R. Cain is my name; 62 years old; reside Falls City, Neb.; farmer; am acquainted with parties to suit for 27 years past; have known the land in controversy since its survey by the Government, 25 years ago; the first improvements were put on it in 1870 or '71; Wm. Herd or David Farrington put the first post
41 thereon about 1871; Henry Jeffrey moved on the northeast quarter during 1872, and no one was then living on the other part of land. I think or heard the posts were put on for James Cottier for the fencing of the farm; the first breaking was done in 1871; Henry Jeffrey broke about 40 acres, and some more was done since. The house was built in 1872. The land is now worth $25 per acre without improvements. It would sell for more with the improvements; $30 to $35 per acre with the improvements. It is worth a rent of about $550 per year and has been worth that for a few years back. The average yearly rental for the farm since its improvements first has been $400 or $450.

Agreed. Above is also evid'c of E. E. Metor, Chas. Henry Jeffry, Henry C. Smith, and reading their depositions waived.

"H."

Patent.

United States to George Washington, his heirs, &c.

North half section 8, t'p 2 north, range 17 east, 6th p. m, Sept, 10, 1860, due form.

T.

Deed.

George Washington—consideration of $500, paid by A. Schoenhert and Ed. S. Towle—conveys to them in fee simple north half sec. 8, t'p 2, range 17 east; covenants gen'l warranty; dated Nov. 3, '66; witnessed.

Acknowledged before notary public, Richardson Co., Neb., Nov. 3, 1860, who certifies, "Personally appeared George Washington, a half-breed Indian, to me well known to be the person named in and who executed the foregoing conveyance, and acknowledged the same to be." * * *

Filed for record Dec. 8, 1866; recorded deed; record 9 page, 133.

K.

George Washington and wife, Mary Childs (23 and 25 years of age, respectively) in consideration of $500, paid by A. Schoenheit and Ed. S. Towle, convey to them in fee simple same land; cov-
42 enants gen'l warranty; dated Feb. 28th, 1868; two witnesses. Acknowledged Feb'y 28th, 1868, before Joseph Brown, Richardson county, Neb., who certifies, "Before me personally came George Washington and Mary Childs, his wife, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed. * * * I further certify that I know the grantors above to be the identical persons they represent themselves to be."

"L."

Deposition, Elisher Deroim, reduced to narrative formal parts and questions omitted, taken March 20, 1871.

1. I live on the Iowa reserve, Richardson county, Neb., and, 2, have since fall of 1854.

3. I belong to the Iowa tribe; 4, am going on 43 years of age.

5. Since 1861, till last winter, I have been U. S. interpreter for that tribe.

6. The Iowa tribe have lived on that reserve since 1854–'8; I am acquainted with George Washington; he belongs to the Iowa tribe of Indians.

9. His father's name is Lag-gar-ash.

10. I have known George Washington ever since he has been in the tribe.

11. He was born on the old reserve called the Iowa trust land.

12. He drew lands on the half-breed reserve, between the two Nemahas.

13. I know of no other George Washington who drew land on the half-breed reservation.

14. Nor have I known of any other Iowa Indians within twenty-five years back by the name of George Washington.

Obj. by pl'ff's att'y.

15. He is in the neighborhood of 26 years of age.

43 16. I know nothing of his having made a deed to Houston Nuckalls.

17. He has been in full tribal relation to the Iowa tribe and lived with them since. 18, I have known him and have been in charge of the several agents over the tribe.

19. He speaks the Iowa language and understands English a little.

20. Knew of his making a deed to Shoenheit and Towle about three years ago.

Cross-ex'm.:

I have been with the Iowa tribe since 1837; know the age of George Washington only from my acquaintance with and knowledge of him; first saw him when an infant; there is no record of his age that I know of; I did not keep any account of the years since I saw him a child; we do not keep any account of years of time as they pass; I have known Lag-gar-ash ever since I can recollect anything; that has been his name since 25 years ago last winter; he has only two sons that I know of; George Washington is here present; I do not think he is 30 years of age; he is not 30; I have good idea he is not 30; when he came to the reserve in 1854 he was about the size of a boy 8 or 10 years of age and was between 8 and 10 years of age; his name has been George in the neighborhood of 20 years; when he was at school he drew land because he was a mixed blood; his mother was full-blood Indian; his father, Lag-gar-ash, is a little over half-blood Indian, of Iowa tribe, but has some white blood; I know it, because he is recommended by a great many of the tribe; I merely knew there was such a man as Houston Nuckalls; do not know what Shoenheit and Towle gave George Washington for the land.

Redirect:

My memory is pretty good generally as to past dates and events; Lag-gar-ash's other son had no name and died in child-birth.

"M."

Lag-gar-ash.

Questions and formal parts omitted; depositions taken March 20, 1871.

44 My name is Lag-gar-ash, head chief of Iowa tribe; am about 55 years of age; have one son, George Washington,

my only son living; he is 26 years old next harvest time, to the best of my knowledge; Major Richardson was U. S. Indian agent when he was born; George Washington drew land as an Iowa mixed-blood, but I do not know where it was; he belongs to Iowa tribe. In 1859 he sold his land to Houston Nuckalls, at Cain's store, in St. Stephens; he was then about 12 or 13 years old. The Iowas moved on the reservation in 1854, and he sold his land to Nuckolls about five years after. He did not understand any English when he sold his land to Nuckolls.

Obj.—Immaterial.

Nuckalls paid him $50 in money and a horse he took at $150; my son, George Washington, is present here.

Cross-ex'm:

I live on the Iowa reserve, on Kansas side; have had eight sons; only the present one was named George Washington. I only count time by the winters. I knew George Washington drew land. I was myself a mixed blood and knew he drew it.

Q. Mr. Towle and Mr. Shoenheit have talked all these matters over with you, have they not?

Answ. They have told me they were going to get the land back for George.

Q. Have they told you what to swear to get the land back?

Ans. That George was only a boy and they were to get the land back or a part of it for him; they never told me to swear to anything. I know George Washington sold his land to Nuckalls, because he told me and brought the money and horse. I have been with the Iowa tribe ever since I was born. My age is about 55.

Re-examination:

I had three children before George Washington was born. I saw his patent for the land and saw him give it to Shoenheit and Towle. He received his patent from Major Vanderslice, Indian agent.

Deposition taken March 20, 1871.

"N."

Warranty Deed. Filed for Record Feb. 8, 1860.

J. Dice Hegler to William Wilkinson.

45 J. Dice Hegler and wife, Mary, in consideration of $300 paid, grant, &c., and convey to William Wilkinson, his heirs, &c., the N. W. ¼ of N. W. ¼, the S. W. ¼ of N. W. ¼, 10 acres off the west side of N. E. ¼ of N. W. ¼, and 10 acres off of west side of S. E. ¼ of N. W. ¼ of section 8, t'p 2 N., of range 17 E., Richardson county, Neb., in fee simble, with gen'l warranty, dated Feb'y 6, 1860, witnessed, acknowledged in due form before a justice of peace, Richardson Co., Neb. Copy from book I, page 197, deed record. Certified Jan. 1, 1881, by county clerk.

"O."

Depositions taken May 30, 1872; formal parts and questions omitted.

Daniel Vanderslice is my name; residence, Doniphan county, Kas.; was agent for Iowa tribe from May, 1853, and have known George Washington nearly all the time since—an Iowa mixed blood; his father was Naggarash, generally known as Leg-far-ash, and about 55 to 57 years of age; George Washington drew land as a mixed blood.

He is not, to the best of my belief and impression, less than 25 years old and not more than 27; there is a record of his age at the agency and at Washington. The supplemental list on which his name appears was presented to me to be examined and reported on in the winter of 1859. I was acquainted with George Washington in April, 1859. He did not understand English then, and we always talked with him through an interpreter. I do not want it understood that he did not understand English at all; I think he did understand me some times when I spoke to him in English, and my broken way of talking Indian. He was then living on the agency under my charge. He was about 15 or 16 years of age in 1859. He drew his land in Richardson county, Nebraska.

O 2.

Samuel M. Irwin is my name; residence, Doniphan county, Kansas; first became acquainted with the Sacs of Mo. in 1837. I was missionary to them from 1837 to 1860. I have been acquainted
46 with the family of Lag-gar-ash since 1839 to identify its members. It was a large and distinguished family. George Washington I am acquainted with; he belonged to the Iowa tribe and family of Laggarash; have known him since his birth, I suppose, but can't identify him by that name; we always called the children by the Indian name. Major Richardson was agent at the time of his birth, to my best recollection.

My conviction is that George Washington was born in 1846, making him now 26. Lag-gar-ash is now 56 or 58. The entire time, from 1837 to 1860, I resided at Iowa and Sac Indian mission school.

"P."

Daniel Vanderlice.

Deposition taken Oct. 26, 1875; questions and formal parts omitted.

My name is Daniel Vanderlice; am in my 77th year; residence, Doniphan county, Kansas; am acquainted with George Washington, of Indian mixed blood, Iowa tribe, son of Nag-gar-ash, commonly called Lag-gar-ash, and have known him since summer of 1853. The father of George Washington being chief of the Iowas and — Indian agent necessitated intercourse between us relative to affairs of the tribe. I became acquainted with his son, who was often with him in my office. I succeeded Maj. W. P. Richardson,

the former agent, in May, 1853, and continued to be agent of the tribe till 1860. From 1853 till 1860 Lag-gar-ash and his son, George Washington, were under my charge as Indian agent; to best of my recollection, George Washington was about 7 years old when I first knew him to identify him; consequently he is now 28 or 29. I am well acquainted with Rev. Samuel M. Irwin and have been since May, 1853; he was missionary, appointed by the American board of missions, to the Iowa and Sac tribes, and — charge of the mission school; do not know where Mr. Irwin is; am informed he is
47 on a visit to Pittsburgh, Penn. I know of no other George Washington of mixed blood belonging to the Iowa tribe. There was a supplementary list of Indians of mixed blood sent to me by the Commissioner of Indian Affairs for examination and correction, which was reported to that bureau, at Washington. It was, I think, in 1859, but cannot recollect. In that list the name of George Washington was included; the list was sent to me for general supervision, to be examined and corrected. There were names on the list whose claims to lands were rejected. The claim of George Washington was approved and a patent issued.

Have you any knowledge now of the age of said Washington on that list?

Ans. My recollection is he was about 14 years old, perhaps not over 13, when the list was made out. It was customary to add the age of the claimant, as near as it could be approximated, from the best information to be *held* at the time; they had been often incorrect. If his age was given in that list as older than 14 or 15 it was not correct. I cannot, of my own knowledge, state how long Maj. Richardson was agent of the tribes before I succeeded him; he is now dead. Lands were granted to Washington as a mixed blood—320 acres; but I do not remember description; all I know of the sale by him to Nuckalls I had from Lag-gar-ash, his father, and heard afterwards he had done so. I advised against it, as he was under age, and the land would become more valuable by time he became 21; have before given a deposition in this case.

W.

Abstract of Answer.

District Court, Richardson County, State of Nebraska.

JAMES D. HEGLER
vs.
GEORGE FAULKNER, JAMES CATLIN, AUG. SHONEHIET, EDWIN S. TOWLE.

48 Defendants deny that plaintiff has a legal estate in fee simple or any other interest in said lands; deny plaintiff is entitled to possession; aver that George Washington, half-breed Iowa Indian, obtained title by patent from United States Sept. 10, 1860, and Feb. 28, 1868, being full age, by deed duly executed conveyed the same to Shoenhiet and Towle, defendants, who delivered possession and sold by contract said premises to Cottier and Faulk-

ner in good faith, who have in good faith improved — at expense of $2,000; that since filing of petition they have ascertained that plaintiff claims title by a claim of pretended conveyances found on deed records of Richardson county of said premises, viz:

Apr. 16, 1859, from George Washington to Houston Nuckalls, Book E, page 333.

Apr. 20, 1859, from said Nuckalls to A. S. Ballard, Book E, page 383.

Sept. 16, 1859, from said A. S. Ballard to James McMillen, Book I, page 194.

Oct. 13, 1859, from said McMillan to James D. Hegler.

Excluded on def'ts' obj. Pl't'ff excepts.

Which deeds are recorded in the deed books and pages, respectively. Said deeds are not executed or acknowledged according to law. The officers taking such acknowledgements were not the officers they represent themselves to be at the times they took the respective acknowledgments. The deeds are not valid as such, and were improperly recorded, and defendants had no actual knowledge of their existence at the times of their respective purchases. Apr. 16, 1859, said Washington was a minor, of the age of 15 years only, and in full tribal relation, living on an Indian reservation under control of an Indian agent, and said pretended deed was executed on the Indian reservation and acknowledged there before a pretended justice of the peace without having jurisdiction. Washington was not then the owner of the premises, and Nuckalls and the plaintiff conspired to cheat and swindle Washington out of the prem-
49 ises, obtained said deed fraudulently, and, to more effectually becloud the title, created the intermediate quitclaim conveyance aforesaid and placed the same on record as aforesaid; that Washington never received any consideration therefor. Prayer for quieting of title and for costs.

Z.

Laws Nebraska Territory, in force April, 1859; approved Jan'y 26, 1856, page 165, acts 1856.

SEC. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money and property received by virtue of the contract and remaining within the control of the ward at any time after attaining his majority.

SEC. 43. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the ninor capable of contracting.

Thereupon the parties rested their proofs.

The plaintiff requested of the court the following instructions to the jury, viz:

The jury are instructed that an official census prepared under the

a right and interest in that land, and, of course, I think he had a right to convey it. I know that there are a diversity of opinions in regard to the right of an Indian to convey his land; the nature of the title vested in them when this treaty was made and the allotment and patent issued pursuant thereto created a title of the highest character, The treaty itself declares that it shall be in fee simple, and that is the highest and best title known to the law, and when they get that, unless there is some positive law that prohibits the Indians and mixed bloods from making a transfer, then he has as good right to make a transfer as any of the more favored white race, the allotment having been made to him, I think. I think he had an undoubted right to make the conveyance to Nuckols or any one else, as it is claimed he did do, but if he had not the title at the time the deed that he made to Nuckols conveyed whatever claim he did have, and if he afterwards acquired a title to the land in question, when he did acquire it, it would inure to the benefit of Nuckols or to those under whom the plaintiff claims—that is, if the deeds have been proven to your satisfaction. So, on the whole, I think it is wholly immaterial whether the party was an Indian or a white man, for he would apply the same rule in either event, and though he may have had no title to the land at the time that he made the conveyance, if he afterwards proved a title, he then had a perfect title if he did not before; then that perfect title would inure to the benefit of Houston Nuckols, if Nuckols got a good deed from him at the time of the alleged purchase. That point, I think, was really immaterial whether George Washington owned the land at the time that he conveyed it; but in giving such instructions the same was modified by the court, as follows, viz:

At the time of the alleged conveyance from George Washington to Houston Nuckols the law of this Territory, as it
54 then existed, and where George Washington resided and where the deed was made, was peculiar in its provisions. It is claimed where a minor owns land and other property and made a sale of it and transferred it to an innocent purchaser, one who knew nothing about his age, representing himself to be 21 years old, so that he could lawfully convey, then he is estopped from setting up the fact that he is a minor; that the substance of one of the instructions asked for by the plaintiff—and I give it in the language in which it is asked for, because I think it is correct—that is, if George Washington, the grantor, represents to Houston Nuckols at the time that he made the sale or transfer by the deed in question, represented himself to be 21 years of age, and Mr. Nuckols believed that fact, relying upon it, took the deed, paying the money and transferring the pony, then he is afterwards estopped from saying that he was not twenty-one years old at the time that he made the deed; but if he made no such representation as that, of course it would be wholly immaterial, and he would not be estopped from denying the validity of the deed.

Then, again, it is possible that if such representations were made that Houston Nuckols knew that they were false. If the representations were made, and Houston Nuckols knew that they were false,

he would stand in the same position as if they were not made at all. In order to have those representations effective the person to whom they were made must act upon them because he believes what the party said about them, and if that was not so it is immaterial what the party said in reference to his age.

Request of Plaintiff.

"If the jury find from the evidence that George Washington, the son of Laggarash, represented himself to be twenty-one years of age at the time of the making of the alleged deed to Houston
55 Nuckols, and that Nuckols relied upon such representations and purchased said land and received of said Washington a conveyance of said land, then, as a matter of law, such conveyance would be good, even though George Washington was not of age."

With the qualifications I have added that instruction is to be taken as it is here given; that instruction is pretty craftily worded and it requires the explanation that I have given it, and when you take the two together I think you will have no difficulty. It says if Nuckols relied on that, the way the law was, a party might rely on that and claim his protection under the law, but nevertheless he might have known that he was relying on a broken reed. Did he have reason to believe that he was twenty-one years of age, or did he know that he was not after those representations were made, if they were made? He might get a person to say that he was twenty-one years of age in the presence of a witness and relied upon that fact; if he did not believe it and rely upon it, then he would not be protected.

Mr. WEBSTER: Give me an exception.

The COURT: The question was raised and discussed to some extent after the copy of one deed from George Washington to
56 Houston Nuckols had been received in evidence properly acknowledged and properly recorded; when that is done the law makes a certified copy of the record proper evidence when the party interested cannot make the original upon which the claim is based. Here there was sufficient evidence, as I thought, to justify the introduction of secondary proof, and that was done, and on the strength of that the deed was admitted, but afterwards it appeared from the testimony of Mr. Walther that when the deed was executed it was done with an interpreter; that an interpreter done all the talking, and, so far as he knew, nothing was said in English by George Washington that Mr. Walther understood. It was done through an interpreter.

If that fact had been made to appear before the introduction of that deed in evidence my impression is that I would have sustained the objection to it and required the party to do as he has done with reference to the other deeds—that is, we would ignore the record entirely because that would not be proper acknowledgment, for the reason that the officer must explain the matter so that he may understand it; an officer is bound to do it. He cannot rely upon the

The jury

representations of other parties; the party himself must understand what he is doing when he executes a deed, and he must acknowledge it to be his own voluntary act and deed, and if the officer does not do that he comes short of his duty.

The officer must know that the deed is properly acknowledged, and he cannot know it through an interpreter unless he understands the language, and it seems to me that there is a good reason for applying such a rule as that. If the grantor does not
57 know what he executes it cannot be said that it was his voluntary act and deed that conveys his land away, but as the deed was admitted and there was afterwards some testimony from Mr. Walther that tended to show that the deed was executed in his presence, I think that might obviate the difficulty and cure the defect.

With reference to the chain of title there are several deeds under which the plaintiff claims. Of course, I think I must say to you, so far as that record is concerned, with the explanation that we have, we must ignore that and treat it as though no acknowledgement had ever been made, as though no record of that deed had ever been made, unless there is testimony enough outside of that to satisfy you that George Washington executed the deed at the time and placed it in the manner claimed, knowing what it was—what he was doing—that the transaction was fair, honest, open, and above board and legitimate as between the parties thereto, then the plaintiff cannot recover at all. That is the starting point; that is his first deed; but if the testimony satisfies you that George Washington was of age at the time, or if he represented himself to be of age, and Mr. Nuckols was induced to purchase on the strength of that representation, believing and relying upon the representation, then the conveyance would be good; but you have to go beyond the record and beyond the certificate of the officer who took the acknowledgement and say from the evidence and say that that was the deed from Washington to Nuckols. What is said of that deed in reference to the acknowledgement is true of the others.

58 Here is one deed from Nuckols to Ballard; it is claimed that that deed is imperfect; that there was no description of any land in it so that a surveyor could go upon the land and identify it. If the record of the deed is correct, then that proposition is correct as the defendants have undertaken to maintain it. If that deed had not the number of the township in it when it was made, when it was placed on record, then it would amount to nothing, because there is no description therein so that anybody could identify it and go upon the land and say it was township one, two, three, or four. There are parts of four townships in range 17 and no one could say whether it was one, two, three, or four or any other township, and therefore the deed itself is worthless—that is, if the deed was made in that way, though it might afterwards have been changed and corrected. How are you to determine that question? I will say, if you are satisfied with the testimony, that that was the condition of the deed when it was made by Nuckols and delivered to his grantee and was not afterwards corrected with the knowledge and consent of Nuckols,

that then no other person would have the right to do so; they would have no right to correct any such mistake, unless it was with the knowledge and consent of Houston Nuckols. If the deed was in that condition, as claimed by the defendants, when it was delivered, when it went into the hands of Stark for Ballard, how was it afterwards; has it at any time been filled out afterwards? What are the probabilities about that? Where a deed is lost and the testimony is imperfect and the facts not made manifest from the testimony presented, from all the questions arising out of controversy you may have to speculate on probabilities to some extent where the controversy arises from the loss of a deed, as is done
59 in this case. You see what the testimony is and say what the probabilities are under the testimony, and if you are satisfied that that deed from Nuckols to Ballard was in the condition in which we find it in Richardson county records, and that it was never filled up with the knowledge and consent of Houston Nuckols, then any one claiming through that chain of title could not recover here, because it would be a worthless description and a worthless deed.

There are two subscribing witnesses to that deed, a copy of which has been presented here. There is some testimony that locates one of them in the State of Oregon or Washington Territory. He is out of reach and his attendance could not be procured. We might not be able to procure his testimony. It is an individual I have known for 27 or 28 years, and it strikes me with some force, because I did not know where he was. And again, the name of William W. Buchanan, a subscribing witness, which I have also known for some 27 or 28 years; there is no testimony to show where he is; I do not know and have not heard for many years; there has been no effort, so far as I know, on this trial to show where he is; that may be a suspicious circumstance; he is a subscribing witness; he ought to be produced if he can be, and where there is no effort made to show where he is, on or before the trial, it may be a suspicious circumstance, and the law requires the best evidence of the execution of a deed where its execution is denied or where it is not properly acknowledged. The production of the subscribing witness, who must first be called to testify, is the best evidence and highest proof known to the law, and it is the duty of the party who relies on the deed to produce that witness in court if that can be done, and if he cannot do that he ought to take his deposition, and if he cannot do either he should prove by those who know his handwriting that the handwriting of the subscribing witness is true; and where
60 neither is done, and the absence of the witness is not accounted for, it is a suspicious circumstance, and the jury are entitled to consider it and give it such weight as it deserves.

It may be, as the defendant claims, that this deed was executed and the number of the township left out, left blank, and was afterwards filled up by Mr. Stark or some one else under his direction. If that was so, unless it was done with the knowledge and consent of Houston Nuckols, it could not have any binding force as against any one.

In reference to the deed from Ballard to McMillan it may be that the testimony is entirely satisfactory on that point. The subscribing witnesses to that deed, as appears by the testimony of Mr. Stark seem to be dead. The handwriting on the lost deed, of course, cannot be shown; they cannot produce it and have it compared, and give experts an opportunity to look at the handwriting.

So far as that is concerned, of course that portion of the proof in this case would have to be dispensed with in the absence of the deed itself, and where the subscribing witness is dead that would let in the other proof, and any one who knew the facts that the deed had been made by Ballard to McMillan would be competent to testify on that point. So far as that deed is concerned, I think that is satisfactorily shown. With reference to the deed from McMillan to Hegler it may be very different.

There are subscribing witnesses to that copy that is here presented in evidence. Who undertake to account for their absence? Does it appear that any effort whatever has been made to procure the testimony of the subscribing witness to that deed? So far as I remember, there is none whatever; but other testimony has been let in because of the peculiarity of this case. There has been
61 no effort made to produce the testimony of the subscribing witnesses or account for their absence; as I said before, the circumstances attending that may be exceedingly suspicious. The deed might have been fixed up for the purpose; where the best testimony is accessible, that, of course, ought to be produced, and if it is not produced the absence of it is usually a very suspicious circumstance, and the jury can attach such weight to that fact as it sees proper in its own discretion.

When a suit is brought to recover possession of land the party in possession has a decided advantage over the one out of possession. The plaintiff has got to rely on his own title. It would not make any difference whether the party in possession had any title at all or not; when a party brings his suit he must rest alone on his own title; he cannot rely on the weakness of the title of his adversary. So far as the title of these defendants is concerned, it is no matter whether they have any title or not; they are in possession and they resist the right of plaintiff to recover; when they do that the plaintiff is put upon his proof, and he must make out in himself a perfect title before the jury can find in his favor, and if they have not done that under the rules which have been stated to you, then manifestly the defendant is entitled to the verdict.

There is no question of an innocent purchaser. Houston Nuckols conveyed by quitclaim deed. It is a special warranty, and the difference between a special warranty and a quitclaim deed amounts to nothing, so far as these deeds are concerned. If these defendants were claiming under Houston Nuckols it would be different; they all claim under George Washington, and if Houston Nuckols had a valid title and could have given a good and valid title to any one, especially the party to whom the conveyance has already been made, then he would be entitled to a verdict, but if he had no title, then the plaintiff, if the chain of title is all right, would take such

62 title as Nuckols had, no better or greater or any other, and if Nuckols' title was subject to be defeated after George Washington obtained his majority, of course these plaintiffs would stand in the same attitude, because there is no question of an innocent purchaser, because Nuckols' deed to Ballard is a special warranty, and warrants the title against all persons claiming under or through him. That is, in substance, a quitclaim deed, and wherever a person claims under a quitclaim deed or special warranty there is no such question as an innocent purchaser arising.

On the whole, if you find that George Washington, the son of Laggarash, was twenty-one years old when he made the conveyance to Nuckols, or that he represented himself to Houston Nuckols when he made the deed as being twenty-one years of age, and Houston Nuckols relied upon that fact and did not know otherwise, then Houston Nuckols acquired a good and perfect title to that land, but if he was not twenty-one years of age when he made the conveyance, and made no such representations with reference to his age, then the defendant is entitled to recover.

I do not remember the description of this one hundred acres that was conveyed by Ballard to Wilkinson. The plaintiff cannot recover that land.

If the jury should be satisfied from the evidence that Laggarash, the father of George Washington, could speak a little English, stood by and transacted the business for George Washington, and George stood there and heard what was going on without understanding it, he would not be bound by it. That is all there is of that. If a party makes a deed to land he must know what he is doing, and he must acknowledge it to be his voluntary act and deed; if all of that does not exist, then the party does not part with the title to the land.

There might be some question about the rescinding of a contract within a reasonable time, but if the testimony should satisfy
63 the jury that George Washington was but fifteen or sixteen years old or thereabout in 1859, when it is claimed to have made the deed to Houston Nuckols, then it would take until 1865 for him to obtain his majority, and he would have to disaffirm the contract within a reasonable time after obtaining his majority, and within a year or so would be a reasonable time.

If the jury should be satisfied from the evidence that the plaintiff is entitled to recover the possession of the premises they will also find what was the rental value of the land four years prior to the commencement of this suit and every year since that, whatever that might be. In determining that question of course you can base your estimate of damages on the value of the land as it stood when the defendant took possession of it, not the rental value of the land after they improved it, but the rental value of the land as they found it, and not after it was made valuable and improved and placed in a state of cultivation. That is not the law; so if you find for the plaintiff, when you come to make up the assessment for the damages you find what the rental value of the premises was before the defendant took possession.

Question by a JURYMAN: They were unimproved lands?

The COURT: Yes; I think that is conceded by both sides. It would be the rental value of unimproved property before the defendants put any improvements upon the same or as it would have remained had they stayed off from it.

Of course, if you find generally for the defendant, you can sign the verdict which Judge Reavis has prepared and which none of you can read. It is correct in its form. If you find for the plaintiff you will find on the other two propositions.

If you happen to differ about any of the testimony about the character of any of the documentary evidence that has been
64 offered you can come into court and have it furnished. That could not be sent to the jury-room unless parties on both sides would consent. You can have the pleadings. What objection will there be to the jury taking the deed from Ballard to Wilkinson?

The counsel on both sides responded that there was no objection. With this the jury retired in charge of a bailiff.

C. A. POTTER, *Reporter.*

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer S. Dundy, district judge presiding at the trial of the above-entitled cause, do hereby certify that the above and foregoing is a true bill of exceptions and includes all the evidence introduced or offered by either party at the trial and the oral instructions given by the court to the jury, together with instructions requested on part of plaintiff and refused, and it is accordingly ordered that this bill of exceptions be allowed, signed, sealed, and made a part of the record herein.

Witness my hand and the seal of the circuit court of the United States, district of Nebraska, at Lincoln, this 6th day of June, 1885, and of the — United States the one hundred and ninth.

ELMER S. DUNDY, *Judge.*

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 107 E. U. S. circuit court, district of Nebraska. James D. Hegler *vs.* George Faulkner. Bill of exceptions. Filed June 6th, 1885. Elmer D. Frank, clerk. Except as to the charge of the court, we find this bill of exceptions correct. June 5th, 1885. Reavis and Schoenheit, att'ys for defendants.

Thereupon, afterwards, to wit, on the 24th day of July, 1885, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals thereof:

65 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between J. D. Hegler, plaintiff, and George Faulkner *et al.*, defendants, a manifest error hath happened to the great damage of the said plaintiff in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 29th day of July, 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

Service of this writ is hereby acknowledged.
Aug. 11th, 1885.

SCHOENHEIT & REAVIS,
Att'ys for Def'ts in Error.

[Endorsed:] No. 107 E. United States circuit court, district of Nebraska. J. D. Hegler, pl'ff in error, *vs.* George Faulkner *et al.*, def'ts in error. Writ of error. Filed July 29, 1885. Elmer D. Frank, clerk.

66 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To George Faulkner, James Cottier, Augustus Schoenheit, and Edwin S. Towle, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein J. D. Hegler is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 29th day of July, 1885.

ELMER S. DUNDY, *Judge.*

Service of this citation is hereby acknowledged.
Aug. 11th, 1885.

SCHOENHEIT & REAVIS,
Att'ys for Def'ts in Error.

[Endorsed:] No. 107 E. United States circuit court, district of Nebraska. J. D. Hegler *vs.* George Faulkner *et al.* Citation. Filed July 29, 1885. Elmer D. Frank, clerk.

67 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios, from 1 to 67, contain true and faithful transcripts from the records and files of said court in the case of James D. Hegler *vs.* George Faulkner *et al.*, and that a copy of the writ of error and citation has been lodged and remains in my office.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 29th day of July, A. D. 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 283. J. D. Hegler, plaintiff in error, *vs.* George D. Faulkner *et al.* Filed September 10, 1885.

Office Supreme Court U. S.
FILED.
MAR 14 1888
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 283.

J. D. HEGLER, PLAINTIFF IN ERROR,

vs.

GEORGE FAULKNER ET AL, DEFENDANTS IN ERROR.

Error to Circuit Court of the United States for the District of Nebraska.

BRIEF FOR PLAINTIFF IN ERROR.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

No. 283.

J. D. HEGLER, PLAINTIFF IN ERROR,

vs.

GEORGE FAULKNER ET AL, DEFENDANTS IN ERROR.

STATEMENT OF CASE.

In 1870 the plaintiff in error commenced an action of ejectment against defendants in error to obtain the real estate described in the record and which is the subject of action therein. This action of 1870 was commenced in the district court of Richardson county, Nebraska, and after issue joined was removed to the Federal court, but was disposed of without determination of the merits. October 4, 1878, the same case, between the same parties, for the same cause of action, was commenced in the said State court. Defendants removed to Federal court before joining issue. In the Federal court the cause was in substance an action of ejectment and a general denial and was so tried to a jury, resulting in verdict and judgment for defendants.

It is admitted that the amount involved exceeded $5,000, and is large enough to give this Court jurisdiction (Transcript, p. 3).

Motion for new trial overruled and stipulation for bill of exceptions (pages 5 to 7, inclusive).

The trial judge certifies that the bill of exceptions, from pages 7 to 43, contains all the evidence and instructions (p. 43)

The references to the record herein are to the print paging.

The action was for the recovery of 320 acres of land situated between the Great and Little Nemeha rivers, in Richardson county, Nebraska, and describes the north half of section eight (8), township two (2), range seventeen (17). This land was in a tract set apart for mixed blood Indians, pursuant to the treaty of Prairie du Chien, concluded July 15, 1830 (7 U. S. Statutes at Large, 272), and the act of Congress approved July 31, 1854, and found in section 5 (4), 10 U. S. Statutes at Large, p. 332. (See Record, pp. 35 and 36.)

April 15, 1859, the land was allotted by the United States to a half-breed Indian named George Washington and certificate of allotment delivered accordingly.

Plaintiff in error claims through a chain of conveyances commencing with deed from George Washington to Houston Nucholls, dated April 16, 1859.

Defendants claim through two deeds, one from George Washington to A. Schoenheit and E. S. Towle, dated November 3, 1866, and the other from George Washington and wife to A. Schoenheit and E. S. Towle, dated February 28th, 1868 (p. 29).

Defendants in error, among other things, contend that at the time George Washington conveyed to Nucholls he was not of competent age to convey, and for that reason plaintiff's title is bad. Under the laws in force in Nebraska at that time other questions of fact became pertinent on the subject of infancy (p. 34). The Territorial laws referred to read as follows:

"SEC. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money and property received by virtue of the contract and remaining within the control of the ward at any time after attaining his majority.

"SEC. 43. No contract can be thus disaffirmed in cases when, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the minor capable of contracting." (Terr. Session Laws Neb., 1856, p. 165.)

Plaintiff in error contends that George Washington was of age when he conveyed to Nucholls, and that if he was not he did not rescind within a reasonable time after coming of age nor bring himself within the conditions required by law to enable him to rescind.

When this cause was first in suit, as aforesaid, the defendants in error in their answer correctly stated the several conveyances under which the respective parties claimed (pp. 33 and 34) showing plaintiff's chain to be—

April 16, 1859, George Washington to H. Nucholls.
April 20, 1859, Nucholls to A. S. Ballard.
September 16, 1859, Ballard to McMillen.
October 13, 1859, McMillen to plaintiff in error.

The originals of these deeds were lost, as shown by the testimony of Hegler, Stark, Morrison and Broady; they consequently had to be proven by the record or secondary evidence. In the record of the deed from Nucholls to Ballard the number of the township was omitted, and that had to be supplied in the original by secondary evidence.

Assignments of Error.

Plaintiff in error assigns as error the following:

1.

The court erred in sustaining the objections to the introduction in evidence of the exemplification from the records of the Indian Department of the instructions pursuant to

and provided by the statutes for carrying out the allotments to the half breeds (pp. 8 and 18, sect. 5 (4), p. 332, 10 U. S. Stat. at Large) reads as follows:

"*And be it further enacted*, That the President be, and he is hereby, authorized and required to cause to be fulfilled the stipulations of the ninth and tenth articles of the treaty with the Sacs and Fox and other tribes of Indians concluded on the 15th day of July, one thousand eight hundred and thirty, by causing said reserved tracts to be surveyed and allotted to persons properly entitled to the same, in fee simple, in such manner and under such rules and regulations as he may prescribe," &c.

The rules and regulations so as aforesaid caused to be prescribed were contained in the paper so excluded, which says to the agent appointed to make the allotment, "Prepare your report in full, to embrace a list containing names of all applicants, arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe," &c.

It was a necessary thing to do, to make some regulation by which to distinguish to whom to allot and to identify the ones receiving allotments. With the best and most complete and careful regulations, much confusion, uncertainty, and trouble must arise in matters of identity. One of the most effective and most difficult marks of description by means of which to identify is the age. By taking age at a given time the personal appearance at any time after would, to a certain degree, correspond so as to be a means of identifying. Names of Indians are of but little account, because so changeable and uncertain. All sorts of schemes were, in the nature of things, to be used to obtain the lands by designing white men by means of false identity. At all events, the law left these things in the discretion and judgment of the President, and he, pursuant to law, did provide that, among other things, in the investigations to determine who was entitled to land, that the age should be taken and recorded to aid in preserving the identity. Now, by what right can we ignore that

record and say it is nothing for any purpose—not even *prima facie* evidence of anything? We submit that it cannot be treated as a nullity, and that the whole investigations and findings under these instructions are *prima facie* evidence of all that is recorded thereof. In order to get at this *prima facie* evidence it is necessary for us to have in evidence the said instructions caused to be prescribed pursuant to law; that is the basis of the whole question. This brings us to the next assignment of error.

2.

The court erred in excluding from the jury the census or list of half breeds entitled to lands, dated February 4, 1858, containing the name of George Washington, son of Lag-gar-ash, mixed Iowa, 20 years of age (pp. 14, 16, 17, 23, and 25). This is the record of the findings in the examinations made under the instructions from the Department of Indian Affairs pursuant to the act of Congress above given. It is *prima facie* evidence of the age. It is a record on that subject wisely made pursuant to law and should have been admitted for what it is worth. It was intended as a safeguard against local land sharks. What is said in the first assignment is applicable here. The court erred in excluding this record.

3.

The court erred in excluding the deposition of William M. Stark, taken November 8, 1870, to which the said original census list was attached (pp. 16 and 25). What is said in second assignment applies to this, and this much more may be said: In this deposition Stark identified himself as the agent who made the allotment and held the original census and issued and delivered the original allotment to George Washington. This goes to show his opportunities for knowing the facts of which he speaks, and hence bears on the credibility of his evidence.

4.

The court erred in excluding from the evidence and the jury the answer of defendants in error in the first suit, involving the title to said land, which answer was sworn to and filed December 29, 1871 (pp. 16 and 17 and 33 and 34). This answer admits that there was a chain of conveyances from Nucholls to plaintiff in error good enough to carry to plaintiff in error whatever right Nucholls had. It ought to have been admitted for this purpose. That answer also admits that on April 16, 1859, George Washington was fifteen years old. It ought to have been admitted for that purpose. That answer admits that he was so old, that he was too old, to be, with his collusive disaffirmance by his deed to Schoenhiet and Towle, who are the attorneys in this case and the real defendants. More will be said of this matter of disaffirmance hereafter.

5.

The court erred in instructing the jury as follows:

"The question was raised and discussed to some extent after the copy of one deed from George Washington to Houston Nucholls had been received in evidence, properly acknowledged and properly recorded; when that was done the law makes a certified copy of the record proper evidence when the party interested cannot make the original upon which the claim is based. Here there was sufficient evidence, as it thought, to justify the introduction of secondary proof, and that was done, and on the strength of that the deed was admitted, but afterwards it appeared, from the testimony of Mr. Walther, that when the deed was executed it was done with an interpreter; that an interpreter did all the talking and, so far as he knew, nothing was said in English by Geo. Washington that Mr. Walther understood; it was done through an interpreter.

"If that fact had been made to appear before the introduction of the deed in evidence, my impression is that I

would have sustained the objection to it and required the party to do as he has done with reference to the other deeds—that is, we would ignore the record entirely, because that would not be proper acknowledgment, for the reason that the officer must explain the matter so that he may understand it; an officer is bound to do it. He cannot rely upon the representations of other parties; the party himself must understand what he is doing when he executes a deed, and if the officer does not do that he comes short of his duty.

"The officer must know that the deed is properly acknowledged, and he cannot know it through an interpreter unless he understands the language, and it seems to me there is good reason for applying such a rule as that. If the grantor does not know what he executes it cannot be said that it was his voluntary act and deed that conveys his land away; but as the deed was admitted and there was afterwards testimony from Mr. Walther that tended to show that the deed was executed in his presence, I think that might obviate the difficulty and cure the defect.

"With reference to the choice of title there are several deeds under which the plaintiff claims. Of course I think I must say to you, so far as that record is concerned, with the explanation that we have, we must ignore that and treat it as though no acknowledgment had ever been made, as though no record of that deed had ever been made, unless there is testimony enough outside of that to satisfy you that George Washington executed the deed at the time and placed it in the manner claimed, knowing what it was—what he was doing—that the transaction was fair, honest, open, and above board and legitimate as between the parties thereto, then the plaintiff cannot recover at all. This is the starting point—that is, his first deed; but if the testimony satisfies you that George Washington was of age at the time, or if he represented himself to be of age, and Mr. Nucholls was induced to purchase on the strength of that representation, believing and relying upon the representation, then the conveyance would be good; but you have to go beyond the record and beyond the certificate of the officer who took the acknowledgment and say from the evidence and say that that was the deed from Washington to Nucholls," (pp. 38 and 39).

This quotation could not be abbreviated and give the connections and statements of the instruction on the subject with requisite fullness.

It is erroneous for several reasons:

1. It is confusing to the jury. It first says the record was admitted; then it says, because of something the witness Walther testified to, it should not have been admitted; then says the acknowledgment was through an interpreter, which vitiates it; that the officer did not do his duty; then says, but as the deed was admitted (meaning record of deed, because the deed had been lost and could not be offered), and afterwards Walther gave some testimony they thought might obviate the difficulty and cure the defect; then says they must ignore and entirely discard the record and find from other evidence a straight, honest transaction, with the parties understanding each other. By the time a jury would get through with that they would have concluded that about all they could make out of it was that the judge desired that they should find for defendants, and the natural result would be they would find accordingly.

2. Another objection to this instruction is that, in so far as it questions the knowledge of George Washington of the transaction, it is altogether beyond the range of the evidence and tends to lead the jury into a different direction. Lag-gar-ash, father of George Washington, says that George did make the deed to Nucholls, and he is a witness for defendants. He says George made the deed and got a horse for $150 and $50 in money, making $200, but that his son was under age (p. 31). George was then present, but did not give his deposition to contradict (p. 30). The answer of these defendants, in 1871, which was erroneously excluded, admits the same thing.

3. That instruction states the law erroneously. It says that an acknowledgment cannot be taken through the

medium of an interpreter, which is not the law. Anything can be done through an interpreter; nothing is too solemn or sacred in law to be done through the medium of an interpreter. But in another way this instruction states the law erroneously; it tells the jury in substance that because the officer, Walther, who took the acknowledgment, testified that it was done through an interpreter that the certificate of acknowledgment, although regular in form, is no evidence of the execution of the deed, and for the same reason the record is no evidence of title. This is not law. The certificate of acknowledgment is the highest evidence of the execution of the deed and proves the execution so as to entitle the deed to be recorded and offered in evidence without further proof, and in case the original cannot be had, that the record can be offered in lieu of the original without other or further proof. Even if the certificate can be contradicted by parol, it is still evidence to be considered, and the jury may say whether they will believe the official act or the after assault from the breath of the witness, who may have become an ally of some party after the controversy arises. The certificate is *prima facie* evidence of execution, and is still evidence to remain with the jury for what they think it worth, even if attacked by oral testimony. The withdrawing the certificate of acknowledgment and the record of the deed from Washington to Nucholls absolutely from the jury was certainly erroneous, and even of such a prejudicial kind that it left the case in such a condition that there was nothing left that any jury was likely to do but find for the defendants on that simple question of the execution of deed from Washington to Nucholls—a question entirely foreign to the real point in litigation, as conceived by the parties, as shown by their pleadings and evidence, and as admitted by the court in another part of the instructions in these words: "The important question for you to determine is as to the age of George Washington at the time of this allotment and the time of making the alleged transfer from him to

Houston Nuchells, under whom the plaintiff claims." (See authorities to ninth assignment of error.)

6.

The court erred in following up the instructions quoted in assignment 5 with instructions in these words: "What is said of that deed in reference to the acknowledgment is true of the others," (p. 39). This could only be true of the deed from Nucholls to Ballard, where the receiver omitted the number of the township, but could not be true of any of the subsequent deeds, all of which were good and regular on the face of the records. What is said of the fifth assignment of error applies with full force here, except as to the one deed from Nucholls to Ballard.

7.

The court erred in suggesting to the jury in instructions that the deed from Nucholls to Ballard might have omitted the number of the township when made and after being recorded the number of the township might have been wrongfully written in (pp. 39, 40). There was no evidence upon which to base such an instruction. For that reason it was misleading and erroneous. As to the loss of the original deed see testimony of Broady, pp. 12 to 14; of Thomas, pp. 14, 15; of Stark, pp. 20, 21; of Hegler, pp. 23, 24. As to condition of record see deposition of Ryan, pp. 26, 27, and Exhibit "A," p. 22. As to whether the number of the township was in the deed see deposition of Stark, pp. 20, 21, and Hegler, pp. 23, 24.

8.

The court erred in suggesting in the instructions a suspicion against the execution of the deed from Nucholls to Ballard, when calling attention to the failure to get

the testimony of the subscribing witness, W. W. Buchanan, and closing with these words: "He ought to be produced if he can be, and when there is no effort made to show where he is on or before the trial it may be a suspicious circumstance, and the law requires the best evidence of the execution of the deed when its execution is denied or where it is not properly acknowledged" (p. 40). The controversy was not over the execution or acknowledgment of that deed, but whether the number of the township was there. The subscribing witness is not supposed to know that. He is only supposed to know whether the grantor actually signed it. When George Washington stood by, his father swore he conveyed the land and George never took the stand to deny it, and it never was denied, and the acknowledgment was regular and in proper form. The jury were probably confused as to whether, as a matter of law, they should ignore that deed because of the want of Buchanan's evidence. It was confusing to the jury and distracted their attention from the real litigation involved.

9.

The court erred in instructing the jury as follows:

"With reference to the deed from McMillen to Hegler, it may be very different. There are subscribing witnesses to that copy that is here presented in evidence. Who undertook to account for their absence? Does it appear that any effort whatever has been made to procure the testimony of the subscribing witnesses to that deed? So far as I remember, there is none whatever; but other testimony has been let in because of the peculiarity of this case. There has been no effort made to produce the testimony of the subscribing witnesses on account of their absence. As I said before, the circumstances attending that may be suspicious. The deed might have been fixed up for the purpose. When the best testimony is accessible, that, of course, ought to be produced, and if it is not produced the absence of it is usually a very suspicious circumstance, and the jury can attach such weight to that fact as it sees proper in its own discretion."

What was said in the eighth assignment of errors, in the main, applies with full force here. A stronger reason can still be added to that assignment. This deed was all regular on its face, with regular execution and acknowledgment, and proved itself, and, absence of the original being accounted for, the record was admissible. The admissibility of the record does not at all depend on whether the grantor's title is good at the time of the conveyance or not. Whether the deed from Nucholls to Ballard was of any validity or not could not affect the law of evidence on the introduction of the deed from McMillen to Hegler. The statutes of Nebraska then and still in force provided for either acknowledgment or proof of the execution of deeds, and in either case, of the acknowledgment or proof, were entitled to be recorded. If acknowledged, the evidence thereof should be the certificate of the officer taking the acknowledgment.

"SEC. 13. Every deed acknowledged or proved and certified by any of the officers before named, including the certificate specified in section five of this chapter, whenever such certificate is required by law, may be read in evidence without further proof, and shall be entitled to be recorded."

Rev. Stat. Neb. 1866, p. 282, sec. 13.

That statute was in force in 1859 and has been ever since. Under this law it is not necessary to account for the original at all before introducing the record, but in this case it was done.

Burbank *vs.* Ellis, 7 Neb., 157.
2d Gen'l Ev. (10th ed.), sec. 299 and note.
3 Wash. R. P. (3d ed.), p. 288.
Original Ed., vol. 2, p. 594, and cases cited.

The certificate of acknowledgment is *prima facie* proof, and to impeach it the evidence "should be extremely clear."

Morris *vs.* Sargent, 18 Iowa, 90.
Von Onnem *vs.* McGryn, 23 Iowa, 300.
Best on Presumptions, 64 and 65.

These authorities apply with full force to fifth assignment of error, to which the attention of the court is specially invited.

10.

The court erred in instructing the jury that if George Washington was not twenty-one years old when he conveyed to Nucholls, nor made representation that he was, the defendant is entitled to recover. This is erroneous, because it ignores the question of disaffirmance within a reasonable time after becoming of age (p. 42).

11.

The court erred in instructing the jury as follows:

"There might be some question about the rescinding of the contract within a reasonable time, but if the testimony should satisfy the jury that George Washington was but fifteen or sixteen years old, or thereabout, in 1859, when it is claimed to have made the deed to Houston Nucholls, then it would take until 1865 for him to attain his majority, and he would have to disaffirm the contract within a reasonable time after attaining his majority, and within a year or so would be a reasonable time."

This erroneously states the law as applicable to this case. It will be discussed further on under the heading "Infancy."

Infancy.

The statutes then in force in Nebraska, so far as applicable to this case, are as follows:

"SEC. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or property received by virtue of the contract and remaining within

the control of the ward at any time after attaining his majority.

"SEC. 43. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the minor capable of contracting."

Sess. Laws Neb., 2d session, p. 165.

This act was taken from Iowa.

Iowa Code 1851, chapt. 87, p. 224.

Oswald & Co. *vs.* Broderick & Co., 1 Iowa, 380.

Proutz *vs.* Edgar, 6 Iowa, 353.

A reasonable time for an infant to disaffirm is not a question of law, as held by the court, but a question of fact to be determined upon the circumstances of each case.

Jenkins *vs.* Jenkins, 12 Iowa, 195.

Stout *vs.* Morrill, 35 Iowa, 47.

Two years is an unreasonable time, but the instructions in this case erroneously instructed that, as a matter of law, a year or so was not unreasonable.

Wright *vs.* German, 21 Iowa, 585.

At the time of these transactions involved herein the law of Nebraska limiting the time for infants to sue after coming of age was as follows :

"SEC. 246. The above limitations of action for the recovery of real property shall not apply to minors so far as to prevent them from having at least one year after attaining their majority within which to commence such actions."

Sess. Laws Nebraska, 1st sess., p. 81. sec 246.

By analogy we can fairly say that, unless there be special circumstances taking the case out of the general rule, infants must disaffirm deeds within one year after becoming of age.

The evidence in this case made George Washington all sorts of ages; some made him over twenty-one years and some much under; but if the first answer of defendants in this controversy was correct, and he was sixteen (16) years old in 1859, as they say in that answer, he was twenty-three years old in December, 1866, when defendants got their first deed, and twenty-five years old when they got the second deed; in either case too late to disaffirm.

The act of 1856 above quoted was repealed without any retroactive clause in 1864.

Sess. Laws, 9 Neb. Ter. Sess., p. 92, sec. 1.

The law of 1856 governs this case.

See Judge Cooley's Pamphlet on "Effect of Change of Law on Right of Action."

Defendants not Innocent.

Defendant Towle negotiated for defendants' title, and he at the time knew of Hegler's title (see Towle's testimony, p. 10). Hegler was then in possession, paying taxes (see Hegler's testimony); but as matter of law defendants could not have been innocent purchasers, because the warranty deed from George Washington to Nucholls was regular and duly recorded, and it matters not whether any of the subsequent deeds through which plaintiff claims were on record or not, since the records then showed that the defendants' grantor, George Washington, was not the owner of the land. (3 Wash. R. P., 3d ed., pp. 285, 292.)

Bates *vs.* Norcross, 14 Pick., 224, 231.

Levy *vs.* Dollarhide, 24 Col., 218.

For the purposes of this case, since the deed from George Washington to Nucholls was a warranty, it makes no difference that the subsequent deeds in plaintiff's chain were special warranties.

Conclusion.

To sum the whole case up in a nutshell, the only legitimate litigation was over the infancy question. By erroneous and confusing instructions the jury were led astray from the real litigation. By erroneous rulings the best evidence of the age of George Washington—the record on that subject, made according to law—was excluded.

Law and justice should give the plaintiff in error a new trial.

J. W. DENVER,
J. H. BROADY,
Attorneys for Plaintiff.

-48.2

Conclusion.

To sum the whole case up in a nutshell, the only legitimate litigation was over the infancy question. By erroneous and confusing instructions the jury were led astray from the real litigation. By erroneous rulings the best evidence of the age of George Washington—the record on that subject, made according to law—was excluded.

Law and justice should give the plaintiff in error a new trial.

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-482

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No. 283.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. 1887.

J. D. HEGLER, Plaintiff in Error.

vs.

GEORGE FAULKNER, Defendant in Error.

IN ERROR

To the Circuit Court of the United States, District of Nebraska.

BRIEF OF T. M. MARQUETTE AND ISHAM REAVIS,

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BRIEF OF T. M. MARQUETTE AND ISHAM REAVIS,

Attorneys for Defendants in Error.

This is an action of ejectment; was tried to a jury in the court below, and a verdict returned for the defendants, upon which the court entered judgment. It now comes into this court on writ of

error. As we understand the position of the plaintiff in error, he claims that the trial court erred in several particulars, among which are the following:

That the court erred in excluding as evidence the pretended official census list furnished Agent Stark by the department at Washington, showing the names and ages of the several half-breeds and mixed bloods who were entitled to land in the tract set apart by the treaty of *Prairie du Chien* in 1830, by which provision was made for the half-breeds and mixed bloods of certain tribes of Indians, which tract is situated between the Great and Little Nemaha rivers, in the now State of Nebraska.

We submit that the census list in question is not the best evidence of the age of the half-breed George Washington, to whom the land in controversy was allotted under the treaty mentioned, and the act of congress carrying it into effect; and its exclusion as evidence in the case could not have prejudiced the plaintiff in error.

At best, such evidence is nothing more than hearsay, and its exclusion was entirely consistent with the law and the justice of the case. There was better evidence within the reach of the plaintiff, and it was incumbent upon him to produce it.

It is urged further that certain representations, touching the age of said half-breed, were made to Houston Nuckolls who purchased the land, by said George Washington, and that the purchase was made in the confidence that such representations were true. This fact is denied, and the testimony satisfied the jury that no such representations were in fact made by the half-breed to Nuckolls, and they so found.

The testimony shows very clearly that such representations were not only not made, but that no representations of any kind were made by the half-breed; and that the half-breed was entirely unacquainted with the language in which the business was transacted. It seems that Laggarash, the father of the young half-breed, did all the business himself, and that the boy took no part in it. There was no law in Nebraska at that time authorizing the acknowledging officer to take the acknowledgment of the deed through the intervention of an interpreter; and it has been held by the supreme court of Michigan that an acknowledgment so taken is void, unless expressly authorized by statute.

Dewey vs. Campan, 4 Mich. 565.

Complaint is also made that the court erred in excluding as evidence, a certified copy of the instructions given Special Agent Stark, by the Interior Department, for his guidance in the discharge of his duties as allotment commissioner. It is submitted that no error was committed by the court in excluding such evidence, as it tended to prove no issue in the case. The all controlling question was the age of the half breed, George Washington, and surely it cannot be said that the instructions to Stark by the chief of the department at Washington, were competent to prove the fact. The agent in all probability availed himself of the best sources of information in reporting the ages etc., of the several half-breeds whom he found entitled to land under the treaty mentioned, but it cannot be successfully established that his report in that particular, is conclusive.

His duties were in no sense judicial, and therefor, his finding is *res adjudicata*, of nothing.